United States Court of Appeals

for the Second Circuit

APPENDIX

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76-1576

United States Court of Appeals

For the Second Circuit

B p/s

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

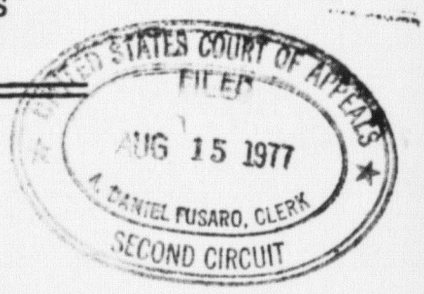
v.

JAMES F. HEIMERLE and
RICHARD G. WARME,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York

JOINT APPENDIX OF DEFENDANTS-APPELLANTS JAMES F. HEIMERLE and RICHARD G. WARME



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ELEANOR JACKSON PIEL
Attorney for Appellant
James F. Heimerle
36 West 44th Street
New York, N.Y. 10036
(212) MU 2-8288

JEFFREY WEINGARD
Attorney for Appellant
Richard G. Warme
401 Broadway
New York, N.Y. 10013
(212) 226-6820

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THE COURT: Don't go telephoning people's chambers and telling them you are not going to be where you have to be. You are accounting to the Court and not any employees. You have now had two strikes against you in the same case. The third strike, and you will be out.

MR. POLLACK: To clear the record, your Honor, I asked Judge Haight's clerk to inform you that I was across the hall.

THE COURT: He did inform me that you were across the hall. It is now twenty minutes of eleven.

Mr. Naftalis, the attorney for Richard Warme advises the Court that he is not in court, and he has no notion of his whereabouts or what he is doing. Have you any application in respect to his bail and as to his custody?

MR. NAFTALIS: Yes, your Honor. Based on the hour, since the case was set down for ten and it is now twenty minutes of eleven and Mr. Warme's whereabouts are unknown, the Government moves to have the bail of Mr. Warme revoked and that he be retained in custody by the marshals and housed at the MCC for the duration of the trial.

MR. WEINGARD: Your Honor, I would ask you to stay your order pending Mr. Warme's arrival so we can know what happened.

THE COURT: What assurance have you that he is going

to arrive and that he hasn't fled the jurisdiction?

MR. WEINGARD: Your Honor, he has been in court on all other occasions. My guess at this time deals with the fact that he has a brand-new child; his wife gave birth yesterday, as I informed the Court yesterday, and his wife herself is ill, and I do not know what circumstances have developed since yesterday, but I would ask the Court just to indulge us a bit until he arrives.

I have spoken to his mother, who herself is unwell. She has a cancer --

THE COURT: Why are you telling me all that about his mother? Do you think he is not here because his mother is ill with cander? You cast discredit on the things you tell me when you start interpolating that material.

MR. WEINGARD: I attempted to contact his mother, which is the only telephone number that I have for Mr. Warme, since he has no phone, and she told me that she suspected he would be in court. She knows nothing about it at the moment, but she has no way of contacting him.

I ask the Court to indulge us a few moments longer, and perhaps there will be an explanation from Mr. Warme when he arrives.

THE COURT: His bail is revoked, and I will decide whether it is forfeited if he shows up today, and for the

duration of the trial he will be remanded to as to insure his attendance properly.

Now, does the Government desire to go ahead in his absence, in view of his fugitive status at this point?

MR. NAFTALIS: Your Honor, the Government humbly begs the Court to wait a short period of time.

THE COURT: Very well. We will wait.

(Recess.)

THE COURT: It is now eleven-twenty. There is no sign of the defendant Warme. His bail has been revoked. There has been no explanationfor his absence.

Federal Rule of Criminal Procedure 43 provides in part:

"In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the rendering of the verdict."

Accordingly, this case having proceeded and the Court, the jury and counsel having been unnecessarily detained by the defendant Warme's voluntary and unexplained and unexcused absence, we will proceed with the trial.

Bring in the jury.

MR. NAFTALIS: Your Honor, if I may, before we bring

in the jury, there is one point that I believe should be taken care of out of the presence of the jury.

Last evening, I was served, at approximately five o'clock, with a handwritten notice from Messrs Weingard and Pollack as counsel for the defendants.

Your Honor, this is in reference to Rule 609 of the Federal Rules of Evidence concerning the impeachment of witnesses in respect of prior criminal record.

We began to mention this to your Honor yesterday. You indicated that we should handle this first thing this morning, before we begin with the jury.

MR. POLLACK: Your Honor, may we have the witness excused for the remainder of this argument?

MR. NAFTALIS: Certainly. The Government has no objection.

THE COURT: Do you want to step out, Mr. Horowitz?

(The witness left the courtroom.)

THE COURT: Yes?

MR. NAFTALIS: Your Honor, the Government's position in respect to the "notice" that it received last evening from counsel is in the nature --

THE COURT: What does the notice say?

MR. NAFTALIS: The notice says that they intend to question the witness Horowitz and the witness Peters as to

certain prior conviction. In respect to the witness Peters these convictions go back to the 21st of February 1938.

The Government also notes in passing that with respect to several of the "convictions" cited by counsel for defense in respect to the witness Horowitz, there were investigations; there were in fact dismissals of criminal process.

Your Honor, the Government recognizes that as a general rule, under Rule 609, the defendants are permitted to impeach witnesses as to prior criminal convictions. However, these prior criminal convictions are generally limited in time to those going back no longer than ten years and of a certain type and quality, those which would go to the integrity or honesty of the witness.

The Government hasn't any doubt as to the right of counsel for the defense to cross-examine any witness the Government submits in evidence before this Court in respect to convictions ten years old or less and those that arise from questions dealing with integrity and truthfulness. However, the Government feels that despite the discretion given the Court under Rule 609, the Government recognizes there is such discretion if such notice is filed with the Government, but the Government submits that convictions of 1938, even convictions as late as 1953, which are going to be offered in

evidence by the defense, those that they wish to inquire into have no bearing on this case.

THE COURT: Let me see the rule.

MR. NAFTALIS: Surely, your Honor. I will pass up a paperback edition of the Rules of Evidence.

THE COURT: And let me see the rap sheet.

MR. WEINGARD: Your Honor, I will submit to the Court the rap sheet of Bernard Horowitz and Joseph Peters, who I have been informed is a potential witness as well, and I think you will be able to tell from the check marks appearing on my copy what I have in mind.

MR. NAFTALIS: I will pass up my copy of the sheet.

THE COURT: Please, gentlemen. The reporter can't take down people talking at once.

MR. WEINGARD: I think Mr. Naftalis, who was anticipating what I have to say, ought to hand over the handwritten notice which we served yesterday explaining which alleged convictions we intend to ask about.

THE COURT: What has the assault in 1938 got to do with this case?

MR. WEINGARD: Are we talking now about Mr. Peters, sir?

THE COURT: Yes.

MR. WEINGARD: I understood that to be a robbery,

Judge, and I understood that was an assault and robbery in State Court, which I assume would have an effect upon his credibility here. It is not really being offered for the question of peacefulness but rather to demonstrate that he is a dishonest person, and I think part of the problem that confronts --

THE COURT: Please. That's enough. Don't go further when you have made your point.

MR. WEINGARD: Yes, sir.

THE COURT: My difficulty here is in determining that the probative value of admitting this evidence outweighs its prejudicial effect to the defendants in the light of the testimony that the defendants were making use of this man in the manner testified to, and my concern is whether or not counsel for the defendants are unwittingly or otherwise introducing prejudice against their own clients by the degree to which the witnesses misconducted themselves and the apparent willingness of the defendants to make use of that kind of a person.

I take it that the defendants' counsel have discussed with their clients and gotten their permission to present the evidence, and unless I hear to the contrary, I am going to go on that assumption.

MR. POLLACK: Your Honor, as to the defendant

Heimerle, our interests lie presently primarily with the witness Horowitz more than the witness Peters, and our interest in the witness Horowitz goes to his long history in forging and passing worthless --

THE COURT: And you are fully aware of the implications of becoming a partner of that kind?

MR. POLLACK: If the jury wishes to so find.

THE COURT: All right. That is up to you. My concern ends with a total awareness of what you are up to, and I will allow the cross-examination.

Bring in the jury.

MR. NAFTALIS: Your Honor, if we may, before we bring in the jury, I have indicated to Mr. Weingard this morning when we discussed the convictions -- if I may have the notice for just a moment to pinpoint one or two -- that they did not result in convictions but rather in dismissals.

THE COURT: Well, if he transgresses the rules, I will take care of it at that time.

MR. POLLACK: I assure the Court that I will abide by the representations made by the Government, and I do not intend to examine with respect to those that resulted in dismissals.

THE COURT: I should hope you wouldn't. A dismissal

is hardly a conviction.

(Jury in box:)

B E R N A R D H O R O W I T Z, resumed.

DIRECT EXAMINATION

BY MR. NAFTALIS: (Continued)

THE COURT: I have a note here from the clerk calling to my attention a circumstance not heretofore reviewed. I would like to have this memorandum marked Court's Exhibit 3.

(Court's Exhibit 3 marked for identification.)

THE COURT: And I find that although the information is interesting, it is immaterial and would not result in any question of disqualification.

If there is any further question of the particular problem that counsel wishes to have the Court address, please let me know now.

MR. WEINGARD. May we review the note, sir?

THE COURT: That is exactly what you are supposed to do.

If there is anything that you want me to do, just write me a note.

(Pause.)

THE COURT: I have a note from counsel for the defendant Warme. Is that an inquiry that you want me to put

to the juror in response to this matter?

MR. WEINGARD: Yes. I think that that would be our request.

THE COURT: And is that all there is to it, Mr. Pollack? Is that your request also?

MR. POLLACK: Yes, your Honor.

THE COURT: Miss Mullins, I have the note that you sent up, that is, the information that you gave to the clerk that your father retired from the Police Department ten years ago.

JUROR NUMBER 8: Seven years ago. I have been out of the house ten years.

THE COURT: He retired from the Police Department seven years ago?

JUROR NUMBER 8: That is right.

THE COURT: But you have not lived with him for ten years?

JUROR NUMBER 8: That's right.

THE COURT: Then this note should be corracted to say that your father retired seven years ago and you haven't lived with him for ten years, and you don't see him regularly.

JUROR NUMBER 8: Except for holidays and so forth.

THE COURT: Except for holidays and so forth.

THE COURT: And the fact of your father's previous

employment would not affect your consideration of the facts in this case in any way?

JUROR NUMBER 8: Absolutely not, your Honor.

THE COURT: Would the fact that your father was a member of the Police Department cause you, consciously or unconsciously, to give greater weight to the testimony of a law enforcement officer merely because of his position as such, or would you be able to evaluate his credibility, the credibility of a law enforcement officer on the basis of his testimony or demeanor?

JUROR NUMBER 8: I came to the Court unbiased, and I feel that on the facts presented I could be as fair as possible.

THE COURT: All right. I think that satisfies the entire inquiry; does it, gentlemen?

MR. NAFTALIS: Satisfactory to the Government.

MR. WEINGARD: Satisfactory to the defendants, your Honor.

THE COURT: Mr. Pollack?

MR. POLLACK: Satisfactory, your Honor.

THE COURT: All right. Thank you.

BY MR. NAFTALIS:

Q Mr. Horowitz, I wish to show you Government Exhibit 2 marked for identification and ask you to examine that and,

if you can, identify it for the Court and jury.

A This is the bag that I used to go to Las Vegas.

Q Are you certain of that?

A Yes.

Q And, Mr. Horowitz, what did you pack in that bag, Government Exhibit No. 2?

A I had $50,000 worth of hundred-dollar counterfeit bills.

Q And from whom did you obtain that counterfeit money?

A From Mr. Warme.

Q And was anyone else present when he gave you that counterfeit?

A Yes. Mr. Peters.

Q And what if anything did Mr. Warme tell you concerning that counterfeit?

A He said that I ought to try to dump it -- that's his expression -- for at least twelve points.

Q And where if any place, did he ask you to do this?

A He knew that I had friends out in Las Vegas who were in the higher echelon of gambling casinos.

Q And did there come a time that you actually went to Las Vegas?

A Yes.

Q And how did you get there?

A By plane.

Q How, first of all, did you get to the airport?

A I was taken to the aieport by Mr. Warme and Mr. Peters in Mr. Warme's blue Cadillac.

Q And who was driving?

A Mr. Warme.

Q And who if anyone obtained the airline ticket for you to go?

A Mr. Warme.

- And was it Mr. Warme who personally paid for this ticket?

A Yes. He gave a check for the amount they asked.

Q Then did there come a time that you actually arrived at the airport?

A Yes. I was at the airport.

Q And which airport was this?

Q TWA -- at Kennedy Airport.

Q And did there come a time that you then went to Las Vegas?

A Yes.

MR. POLLACK: May I respectfully object tc the leading questions of this witness?

THE COURT: Please proceed.

MR. NAFTALIS: Thank you, your Honor.

Q. Mr. Horowitz, what if anything occurred when you went to Las Vegas?

A. I went there with the sole interest of trying to get rid of these things, but the first day that I was in the hotel, Caesar's Palace, somebody either broke into my --

MR. WEINGARD: Objection. Not responsive to the question, sir. Move to strike the last portion of the answer.

THE COURT: Just read the question.

(Question read.)

THE COURT: Mr. Horowitz, answer the particular question and wait for a further question. Just listen to the question.

(Question read.)

A. I checked in at Caesar's Palace.

Q. And after you checked in, what if anything did you do with the counterfeit that you said that you had in that bag?

A. I gave that to the bell captain. I checked that with the bell captain rather than taking it up to my room.

Q. Did there come a portion of your stay in Las Vegas that you were able to sell this counterfeit?

A. No.

Q. What if anything did you do with this counterfeit?

A. I had the counterfeit at this bell captain's, and I had four or five or six samples in my coat pocket, and I intended to show that to certain people out there.

Q. And did there come a time that you sold any of this counterfeit?

A. No.

Q. What happened after your attempts to sell the counterfeit?

A. Somebody burglarized my room and took my ticket and my -- my plane ticket to return to New York and took the samples that I had in my pocket.

Q. And about how many samples did you have?

A. About five or six samples in my pocket.

Q. And when you say five or six samples, do you mean five or six counterfeit bills?

A. Hundred-dollar bills.

Q. What if anything did you do after that?

A. I approached a friend of mine who was out there at the specific time and I asked him what --

MR. WEINGARD: Objection. Hearsay. Violation of the confrontation clause.

THE COURT: Yes.

(To the witness:) You talked to a friend of yours?

THE WITNESS: Yes, your Honor.

THE COURT: All right. Stop there and wait for another question.

Q And what if anything did you do in consequence of the conversation with this other gentleman?

A He warned me --

MR. WEINGARD: Objection.

THE COURT: No; you can't say that. You see, he is not here in court, and he is not one of the parties to this case.

THE WITNESS: Involved.

THE COURT: So you can only say what you did, your verbal act or acts.

You say you had a conversation?

THE WITNESS: Yes.

THE COURT: Following the conversation, what occurred?

THE WITNESS: Following the conversation, I immediately became upset about having that money in my possession, because he warned me --

THE COURT: No. You became upset?

THE WITNESS: Yes.

THE COURT: After you became upset, what did you do?

THE WITNESS: I tried to borrow money in order to

get back home as soon as possible.

A And did there come a time, Mr. Horowitz, that you did return to New York?

A Yes, sir.

Q And what if anything did you bring with you when you returned to New York?

A I brought back the bulk of what counterfeit money I had.

Q Would that be all the counterfeit, excluding the few pieces that were stolen from your room?

A Yes.

Q And what if anything did you do with that counterfeit when you returned to New York?

A I gave it back to Mr. Peters and Mr. Warme.

Q Mr. Horowitz, at any time did you receive any compensation from Mr. Warme or Mr. Peters for going to Las Vegas?

A No.

MR. NAFTALIS: Your Honor, at this time, the Government moves --

THE COURT: Do you want to offer something?

MR. NAFTALIS: I am sorry. The Government offers Government Exhibit 2 marked for identification.

THE COURT: Any objection?

MR. WEINGARD: Yes. I don't see any connection otthe defendants.

THE COURT: Overruled. Received subject to connection.

(Government Exhibit 2 for identification was received in evidence.)

Q Mr. Horowitz, before you left to go to Las Vegas, did there come a time when Mr. Warme and Mr. Peters came to your home?

A Yes; they did.

Q And what if anything did they do at your home?

A They doctored up these bills, these hundred-dollar bills, in order to make it more feasible, so they could be passed.

Q And could you explain what if anything they did to this end?

A Yes. They took a steam iron and spray starch to these bills, and they used that as a -- as a better -- to better these bills, to make it more feasible.

Q Now, after they processed these bills, what if anything did they do with all of the bills?

A They had placed them with a band around them in thousand-dollar denominations. They took a band, a bank band, and put it around these different bills.

Q And what if anything did they next do?

A Next, they told me that they would try to go to the travel agency directly on a diagonal across the street from where I lived and see if they could get a ticket for me to go to Las Vegas.

Q In addition to that, Mr. Horowitz, what if anything else did they do with that treated counterfeit?

A They put the additional amount that they had plus the $50,000; they put it into the -- beneath the -- in my freezer. Beneath the freezer there was a tray, and they put it in that tray.

Q Was this tray within the refrigerator?

A What?

Q Was this tray inside the refrigerator?

A Inside the refrigerator.

Q I draw your attention, Mr. Horowitz, to approximately the 10th of December 1975. Were you with Mr. Warme at that time?

A Yes; I was.

Q Do you recall where you were with him at that time?

A I was with him in his car, and I needed money badly.

MR. WEINGARD: Excuse me, your Honor. Before it continues, I missed the first question concerning the date

and time. May we have that reread?

THE COURT: Yes.

(Record read.)

THE WITNESS: No. He needed money badly.

Q And what if anything did Mr. Warme say to you on that day?

A He said to me -- we discussed the idea, and he suggested that I go into Gimbel's and buy a heating pad with one of these counterfeit bills.

Q And where was this Gimbel's located?

A Gimbel's in Cross County.

Q And what city or village was that?

A That's in Yonkers.

Q Yonkers, New York?

A Yes, sir.

Q Was there anyone else present?

A Mr. Peters.

Q Did there come a time that you went into Gimbel's?

A Yes; there did.

Q And what if anything did you bring into Gimbel's with you?

A With me, the hundred-dollar bill that was given to me.

Q And what if anything were you directed to do con-

concerning that hundred-dollar bill?

A. I was supposed to buy a heating pad and with the additional money -- give them back the additional good money.

Q. And whom were you to give the additional good money to?

A. Mr. Peters and Mr. Warme.

THE COURT: Are you saying that you were supposed to use one of these bills and get some good money in change and give him the change? Is that what you were going to do?

THE WITNESS: Yes, your Honor.

Q. Mr. Horowitz, I ask you to examine Government Exhibit No. 1 marked for identification and ask you if, after examining it, you can identify it.

A. Yes; I can.

Q. Will you please indicate to the Court and jury what it is?

A. That's the hundred dollars I tried to present to the Macy's -- rather, the Gimbel's Department Store.

Q. Mr. Horowitz, were you successful in spending this counterfeit hundred-dollar bill at the store?

A. No; I wasn't.

Q. What happened in the store?

A. The young lady who was the cashier called the security, and the security called the agents.

Q And which agents to you refer to?

A Mr. Sam. I don't know his last name.

Q And do you know by whom Mr. Sam is employed?

A By the Federal Government.

Q And specifically which agency?

A The Treasury, the Treasury Department.

Q Mr. Horowitz, who gave you the counterfeit hundred-dollar bill?

A Mr. Peters.

Q And who else was present when it was handed to you?

A Mr. Warme.

MR. NAFTALIS: Your Honor, Government offers Exhibit No. 1 for identification into evidence.

MR. WEINGARD: May I have a short voir dire?

THE COURT: Yes.

MR. WEINGARD: Thank you.

VOIR DIRE EXAMINATION

BY MR. WEINGARD:

Q Now, I think you indicated that you were seated in an automobile when you first obtained the particular exhibit; is that correct?

A Correct.

Q And you were placed under arrest at the time you tried to pass this particular hundred-dollar bill?

A. No; I wasn't.

MR. NAFTALIS: Objection, your Honor.

THE COURT: Overruled.

A. (Continuing) I was not placed under arrest.

Q. Were you questioned by a Mr. Sam at that time?

A. No; I wasn't. Not at that time.

Q. You were released from Gimbel's at that time; is that correct?

A. Correct.

Q. And that would be after the cashier accepted this particular bill, as you testified; is that so?

A. She didn't accept it.

Q. But she took it from your possession?

A. Yes.

Q. And she turned it over to the Federal agent?

A. No; she didn't. She turned over to the security agent.

Q. The secutiry agent of the store?

A. Yes, of the store.

Q. And you were released at some point?

A. Yes.

Q. Did you acknowledge that you knew this was a counterfeit bill?

A. No; I didn't.

Q Were you asked to sign the bill?

A No; I wasn't.

Q Did you make any notes or marks on the bill which would enable you to identify this specific bill as the one you gave to the store?

A I looked at it very carefully, and they put certain marks on it.

Q Did you put any marks on it?

A No.

Q Did you see the marks they put on it?

A I did not.

Q And, of course, you have no recollection of the serial number?

A The serial number?

Q Yes.

A I can tell you that was the standard serial number, because all the bills given to me at that time had the same mark.

MR. WEINGARD: I object, sir.

THE COURT: Overruled.

MR. NAFTALIS: Thank you, your Honor.

(Government Exhibit 1 for identification was received in evidence.)

THE COURT: Give it to the jury.

MR. NAFTALIS: May I just have a moment, please?

(Pause.)

BY MR. NAFTALIS: (Continuing)

Q. Mr. Horowitz, how did you first come to know Richard Warme?

A. I knew Richard Warme about fifteen or twenty years ago. He lived in the vicinity of where I worked.

Q. And how did you come to see him again in November of 1975?

MR. WEINGARD: Objection. Asked and answere-.

THE COURT: Overruled.

A. I met him at the racetrack, and he told me at that time that he owned a motel out in Montauk Point.

MR. WEINGARD: Your Honor, I am going to move to strike. This apparently is not in furtherance of any alleged conspiarcy, and I would move on grounds of hearsay and violation of the confrontation clauses.

THE COURT: Motion denied. Go ahead.

Q. Mr. Horowitz, were any requests made of you by the defendant Richard Warme at that time?

A. No. He took me out there. As a matter of fact, he drove me out there to Montauk. I saw the place. I was rather amazed that he had --

THE COURT: Strike out that part. The answer is no.

MR. WEINGARD: Your Honor, I anticipate the next question --

THE COURT: I don't anticipate the next question, so I can't rule on it. Please, let's wait until we hear the question. Don't interrupt the trial unnecessarily.

MR. WEINGARD: Judge, may we have an instruction to the jury?

THE COURT: I don't think it is necessary. The Government will be instructed to proceed properly, and I will rule when the occasion arises.

Go ahead.

Q Mr. Horowitz, yesterday --

MR. NAFTALIS: Withdrawn.

Q Mr. Horowitz, you testified that you went to Irvington, New York, with Mr. Warme, Mr. Peters and Mr. Heimerle.

A That's correct, sir.

THE COURT: Now was that the question you anticipated?

MR. WEINGARD: In part, it is, your Honor.

THE COURT: Now I am very clear that your objection is improper.

Go ahead.

MR. NAFTALIS: Thank you, your Honor.

Q Mr. Peters -- I am sorry -- Mr. Horowitz, will you please describe to the Court and jury what you observed happen

in Irvinton, New York.

MR. POLLACK: Objection, your Honor. Asked and answered yesterday.

THE COURT: Overruled.

A. Prior to going there, we went --

THE COURT: He is talking about Irvington, New York. Never mind about prior. What happened --

THE WITNESS: Pardon me, your Honor. I was explaining about the car.

THE COURT: Don't explain. At Irvington, what happened?

A. (Continuing) At Irvington we went into a building which had a garage.

MR. POLLACK: Your Honor, may I request that the witness identify who "we" are?

THE WITNESS: What did he say? I didn't get --

THE COURT: That is not of your concern.

If it doesn't come out in the course of the Government's attempt to build up a story, you can bring it out in cross examination. He can't respond to more than one thing at one time, no matter how many thoughts you would like to have satisfied in the meantime.

Q. Mr. Horowitz, will you please continue?

A. This building in Irvington had about a six-car

garage. It was -- there was an an apartment house above the garage. It was a red brick building and white -- the garage was all white, and while I was in the car, in Mr. Heimerle's car, a black Pontiac, they went inside and talked, Mr. Heimerle, Mr. Warme and Mr. -- and Mr. Peters, and the remarks that were passed thereafter -- Mr. Warme says, "I'm not interested in the quality. I'm only interested in the price."

Q Was that --

MR. WEINGARD: Objection. No first hand knowledge, sir.

THE COURT: Is this what you heard?

THE WITNESS: Yes, your Honor.

THE COURT: Go ahead.

Q And who stated that, Mr. Horowitz?

A Mr. Warme stated as much to Mr. Heimerle.

Q And who else was present when he made that statement?

A Mr. Peters and myself.

Q And when did he make that statement?

A Prior to going into the garage to make the deal.

Q And prior to going into the garage, what if anything else was said by Mr. Peters, Mr. Heimerle or Mr. Warme?

A Wall, he stated the fact that all he had at the

present time was $1,500.

Q Who is he?

A Mr. Warme. And Mr. Heimerle said to him, "If you are going to go through with this deal with poor quality, in the future we are going to have very good quality merchandise. You will be given first priority."

In other words, a package deal.

THE COURT: Was this $1,500 some of this merchandise, or was it good money?

THE WITNESS: Good money. $1,500 of good money.

THE COURT: Go ahead.

Q And what if anything was this merchandise, Mr. Horowitz?

A Counterfeit money.

Q And was this the counterfeit hundred-dollar bills?

A Counterfeit, because it was easily recognized, because the --

THE COURT: Do you know what the denominations were?

THE WITNESS: Hundred-dollar denominations. A yellowish tint. It had a yellowish tint over it.

Q And, Mr. Horowitz, you stated that Mr. Warme said that he would have the first crack at it?

A Correct.

Q And in what denominations were they?

A. They were twenties, fifties and hundreds.

Q. And what did Mr. Warme respond to that?

A. "Yes." He said, yes, he would like to get the twenties and fifties, but the hundreds are a little difficult to pass.

Q. Did there come a time, Mr. Horowitz, when you were shown any twenty- or fifty-dollar counterfeit bills?

A. Yes.

Q. And who showed you those bills?

A. Mr. Heimerle.

Q. And what if anything did he say when he showed you those bills?

A. He said to me, "If you can get people to take the hundreds, maybe they'll get a crack at the fifties and twenties."

Q. Did Mr. Heimerle show you the hundred-dollar bills at that time?

A. Yes.

Q. Were they the bills that he had shown you before?

A. No; this was a new batch.

Q. So he showed you twenties, fifties and hundreds?

A. Yes.

Q. Was there anyone else present when he showed you the twenties, fifties and hundreds?

A. Mr. Peters.

Q. What if anything did you do after you had this conversation with Mr. Heimerle concerning the twenties, fifties and hundreds?

A. I went around trying to find out who might be interested in obtaining these particular bills.

Q. Did anyone else indicate to you that they had obtained any of the twenties, fifties or hundreds of this new batch of counterfeits?

A. Yes. Fat Joey and a fellow by the name of Glock, Freddy Glock.

MR. WEINGARD: I am going to move to strike that. There is no --

THE COURT: Strike it out.

MR. WEINGARD: I ask that the jury be admonished --

THE COURT: I will take care of it.

When anything is struck out, it is not in evidence.

Q. Mr. Horowitz, did there ever come a time when you had discussions --

MR. NAFTALIS: Withdrawn. Excuse me just a moment, your Honor.

(Pause.)

MR. NAFTALIS: No further questions your Honor --

THE COURT: All right.

MR. NAPTALIS: I am sorry, your Honor. I do have another question.

Q. Mr. Horowitz, yesterday you testified that you pled guilty in June of 1972 to breaking and entering a post office; is that correct?

A. Correct.

Q. And that you were sentenced to three ane a half years in prison for that?

A. Correct.

Q. In addition to that incident in your criminal background, Mr. Horowitz, in December of 1965 did you plead guilty to buying and receiving stolen property and were you sentenced to a suspended sentance?

A. Correct.

Q. Similarly, in November of 1962, you received a suspended sentance for attempted forgery in the second degree?

A. Yes, sir.

Q. Also in 1962 you were convicted and sentenced to Sing Sing Prison for possession of a stolen American Express money order?

A. That's true.

Q. And in 1960 you received one to two years for uttering worthless checks?

A. No. I never received any time.

Q You were paroled?

A No --

Q But did you plead guilty to uttering worthless checks in 1960?

A No; I didn't.

Q And in respect to going back to 1953, Mr. Horowitz, did you plead guilty to forgery in the second degree?

A Yes.

Q And you were sent to prison for that, were you not?

A Yes.

Q And similarly, in 1952, you also pled guilty to forgery?

A Yes.

Q Mr. Horowitz, yesterday you also testified that you are the Bernard Horowitz in this indictment.

A Yes.

Q And you also testified that you pled guilty to this indictment.

A Yes.

Q Pled guilty to all the charges against you in this indictment?

A Correct.

Q Were any offers or deals made to you by the United in order to induce your plea of guilty?

A. No.

Q. Have any promises been made with respect to your sentencing?

A. No.

Q. Were any rewards, gratuities or moneys given to you?

A. No.

Q. Did you plead guilty freely?

A. Yes; I did.

Q. Was any pressure brought upon you by the Government in any manner?

A. No.

Q. Was there any offer made in respect to or in exchange for your testimony here today?

A. No; it wasn't.

Q. And you are testifying here freely?

A. Most assuredly.

Q. Mr. Horowitz, did you ever tell Mr. Heimerle about your criminal background?

A. He knew. He knew that I had served time in a Federal as well as in a State institution.

Q. And how did he know?

MR. POLLACK: Your Honor, may I request --

Q. How did he know?

A. How do I know?

Q How did you know he knew?

A He stated he met Joe Peters in Greenhaven Prison.

MR. POLLACK: I object. Unresponsive and irrelevant.

THE COURT: The objection is sustained.

Mr. Horowitz, did you ever have any conversation about your background and your convictions with Mr. Warme or Mr. Heimerle?

A Yes; I did, your Honor.

THE COURT: That is what the lawyer wants to find out about that. Tell him about that.

MR. POLLACK: Your Honor, I move for the declaration of a mistrial based upon his answer.

THE COURT: You want a new trial? Is that what you say?

MR. POLLACK: I move for the declaration of a mistrial.

THE COURT: A new trial or a mistrial?

MR. POLLACK: Declaration of a mistrial and withdrawal of a juror.

THE COURT: You keep dropping your voice. I don't get your request.

MR. POLLACK: I request the declaration of a mistrial.

THE COURT: The motion is denied.

Q. Mr. Horowitz, as I understand your answer, you did have conversations with Mr. Heimerle and Mr. Warme concerning your criminal background.

A. Yes; I did.

MR. NAFTALIS: No further questions.

CROSS-EXAMINATION

BY MR. POLLACK:

Q. Good afternoon, Mr. Horowitz.

A. Good afternoon.

Q. Mr. Horowitz, have we ever met before?

A. Met who?

Q. Have you and I ever met before?

A. I don't recall.

Q. Mr. Horowitz, can you tell us the date that you were arrested in this matter by Treasury agents?

A. The date? I can only tell you about, but I can't tell you the exact date.

Q. About, sir?

A. Oh, I would say Mr. Sam and another gentleman came into my house in the early part of March or April.

Q. Of this year?

A. Of this year.

Q. And were you arrested at that time on this charge?

A. Yes; Yes; they did.

Q. Now, how long was that after the occurrence at Gimbel's in the Cross County Shopping Center?

A. On, I would say about two or three months.

Q. And you left Gimbel's, leaving with them the hundred-dollar bill you represented to this jury you tried to pass?

A. That's correct.

Q. Since March or April, did you ever have occasion to have discussions with agents of the Treasury Department?

A. Yes.

Q. On how many occasions?

A. I don't know exactly. I mean, if I were to say exactly, I would be making a mistake.

Q. In excess of five? More than five?

A. Less than five.

Q. And did you sign a statement? Were you ever given a statement to sign?

A. No.

Q. Did you ever have discussions with Mr. Naftalis?

A. Yes.

Q. On how many occasions?

A. About three or four.

Q. Did Mr. Naftalis take notes while you were having

discussions with him?

A. Yes.

Q. And did the agents take notes while you had discussions with them?

A. I believe they did.

MR. POLLACK: Your Honor, I request that those notes be produced.

MR. NAFTALIS: Your Honor, Mr. Pollack and I have discussed this ad nauseam. I informed Mr. Pollack that neither the agents nor I took notes, and all the 3500 material was turned over yesterday to Mr. Pollack and Mr. Weingard.

THE COURT: Next question.

Q. Mr. Horowitz, when you were first arrested, were you taken to a detention cell?

A. No. I was taken to, what do you call, the Twin Towers.

Q. And you had discussions with the agents?

A. Discussion? They asked me certain questions, that's all.

Q. Now, Mr. Horowitz, how long have you known Moseph Peters?

A. On and off for about twenty -- almost twenty years.

Q. During that time, have you ever been engaged in criminal conduct with Mr. Peters?

A. What?

Q. Have you ever been engaged in criminal conduct with Mr. Peters?

A. With Mr. Peters, no.

Q. Are you gainfully employed now, Mr. Horowitz?

A. Yes; I am.

Q. Where are you employed?

A. At Theodore Rosenberg -- Rothenberg, auctioneer.

Q. And where is that, sir?

A. We go from store to store, or wherever --

THE COURT: He wants to know their place of business.

THE WITNESS: He has his home. He operates out of his home.

Q. How long have you been so employed?

A. About four or five months.

Q. And what do you do for Mr. Rothenberg?

MR. NAFTALIS: Your Honor, this is irrelevant.

THE COURT: Overruled.

A. What do I do? I help him in the auctions. I do anything that he asks at an auction.

Q. He pays you for this?

A. Surely.

Q. Your salary is what?

A. Approximately twenty dollars a day.

Q. And before you worked for Mr. Rothenberg in 1976, were you employed?

A. Before working for Mr. Rothenberg, no, I wasn't working at all.

Q. What was the last job you held prior to working for Mr. Rothenberg?

A. I worked for Emanuel Maas, at his place of business.

Q. When did you work for Mr. Maas?

A. The exact dates? I can't tell you the exact dates. About a year and a half ago. Prior to that time, I --

Q. Excuse me, sir. What did you do for Mr. Maas?

A. I worked in a store.

Q. What kind of --

A. He --

Q. What kind of store?

A. At that time, he had a hardware store. He had another store in Greenwich Street.

Q. That is in Manhattan?

A. Yes.

Q. And how long did you work for Mr. Moss?

A. Maas? I worked for him about seven or eight months. During the interim, which you didn't ask me, I had an operation on my foot. That's what caused me to be unem-

ployed.

Q For how long have you been unemployed?

A Well, I was in the hospital over three months. I had two toes amputated.

Q Now, Mr. Horowitz, where do you live?

A At the present time, in Astoria.

Q And do you live in an apartment?

A Yes.

Q And during December 1975, where did you live?

A December of 1975? In Astoria -- Oh, no. December of 1975 -- yes. In Astoria.

Q In the same place you are living now?

A No.

Q In a different place?

A Yes.

Q And in this time period, you were going on Unemployment?

A Going on Unemployment.

Q Were you unemployed in December of 1975?

A I believe I was. I had just come out of the hospital.

Q And your unemployment was caused by a physical ailment which prevented you from moving around?

A That's correct.

Q Did you have a car at the time?

A No.

Q How did you get around in the city?

A Trains.

Q Now, sir, you testified that you met my client, James Heimerle --

A Correct.

Q In what month, sir?

A About November of 1975.

Q Was that the first time you met my client?

A That's correct.

Q And where did you meet him?

A At a bar on Broadway.

Q And what was the name of the bar?

A Carruthers'.

Q Broadway and where?

A 33rd or 32nd.

Q And do you frequent that place?

A No.

Q You were in there that day alone?

A No. I had had occasion to meet Joe Peters in that particular bar, and he introduced me to --

Q On that date, how far was that bar from your home on that date?

A. About six blocks. Six, seven blocks.

Q. And did you walk to the bar?

A. Correct.

Q. And you met Mr. Heimerle as you have testified?

A. Yes.

Q. Was this a pre-arranged meeting?

A. I don't know whether it was pre-arranged insofar as Mr. Peters was concerned. He's the one who introduced me.

Q. As far as you were concerned, sir, did you go to the bar by yourself?

A. Yes.

Q. Did you meet Mr. Peters there?

A. Yes.

Q. Were you supposed to meet Mr. Peters there?

A. Yes.

Q. Was there a purpose in your meeting Mr. Peters?

A. No. There was no particular purpose.

Q. What time of the day was that?

A. It was in the evening. I would say about seven or eight o'clock.

Q. What were you wearing?

A. What was I wearing? Clothes.

Q. I appreciate that, but how were you dressed, sir?

A. I don't follow.

THE COURT: He wants to know, did you have a suit on?

THE WITNESS: I don't recall whether I had a suit. I can't see the -- reasoning.

THE COURT: Well, let him worry about why he is asking the question. Do you remember how you were dressed? Were you dressed in green or pink or brown?

THE WITNESS: I was dressed warmle, because it was rather cool.

Q. Was this after Thanksgiving or before?

A. I would say it was before Thanksgiving.

Q. And when you got to Carruthers' bar -- was that the name?

A. Yes.

Q. -- you met Mr. Peters?

A. That is correct.

Q. Was my client, Mr. Heimerle, with Mr. Peters at that time?

A. Later, he came into the bar.

Q. When you came into the bar, was Mr. Peters alone?

A. Yes.

Q. Now, when you say my client came into the bar, approximately what time did he come into the bar?

A. I would say seven or eight o'clock.

Q. Seven or eight o'clock?

A. I don't know exactly.

Q. How long had you been there before you say my client arrived?

A. Ten, fifteen minutes.

Q. And how was my client dressed?

A. He was dressed rather neatly -- and that's all. I don't remember the suit he had on.

Q. Did he have a jacket and a tie on?

A. Yes. Yes.

Q. Was he wearing a tie?

A. I'm pretty sure he was, yes, or a loose collar. He had a loose collar, what you call a sport shirt.

Q. Was it a leasure suit or a formal business suit?

THE COURT: Let's get on to something else.

THE WITNESS: I can't understand the value of --

THE COURT: No. That's --

THE WITNESS: He had something -- he was dressed rather neatly. Do you expect me to remember the exact attire that he had on at that particular time? Would you have remembered that? I defy any many to remember.

MR. POLLACK: May I ask the Court to direct the witness to answer the question?

THE COURT: Put your next question.

Q. Do you remember the color of the suit he was wearing?

A. I would say the same color he had on at the present time. I noticed he had a tendency to wear mostly brownish clothes.

Q. And did he have a beard at that time?

A. He had -- what do you call -- like a little moustache and a little goatee.

Q. So he had a beard. How about the length of his hair?

A. The length of his hair was quite long.

Q. Longer than it presently is?

A. Yes.

- Over his collar, as he presently sits there?

A. Over his collar? Did it -- it was quite long. I don't know how long. I didn't take a ruler and measure it.

Q. No. In relation to the clothes he was wearing, sir, did --

A. Yes.

Q. -- did it come over the collar?

A. Yes; it was quite long.

Q. Now, at the time you testified Mr. Heimerle entered the bar --

A. Yes.

Q -- where were you seated?

A I don't think I was seated. I was standing there. I was watching. They had like a shuffle -- where they play pool there. I was watching that.

Q And where was Mr. Peters?

A Peters was playing the same.

Q And did there come a time when Mr. Peters stopped playing the game?

A Yes. He started to talk to this gentleman, and then he called me over.

Q Where did you go with Mr. Heimerle? Were you at the bar?

A Yes: at the end of the bar.

Q And did you sit down?

A Yes.

Q Did the three of you sit down?

A Yes.

Q Where were you seated in relation to Mr. Peters?

A Mr. Peters sat next to Mr. Heimerle. I sat next to Mr. Peters. Mr. Heimerle was the closest to the wall.

Q Was the bar crowded at this time?

A You want me to answer honestly? I don't recall whether there was a crowd. They had customers in there.

Q Was it a little bit noisy?

A. Yes.

Q. Did you have to speak loudly to be heard among the three of you?

A. Loudly? No.

Q. While you were speaking to Mr. Heimerle, you would have to talk loud through Mr. Peters?

A. No. I could hear him quite well. He had a soft voice.

Q. But you could hear him?

A. Yes.

Q. How how long were you in the bar with Mr. Heimerle on that occasion?

A. You mean, in minutes, hours, or how long do you -- what are you referring to?

Q. Whatever frame of reference you can use, Mr. Horowitz.

A. It wasn't too long, but, however, he made a reference to the fact that he had had to get back to the Hotel Woodward at eleven o'clock. He was in the halfway house at that time.

MR. POLLACK: Your Honor, I object and move to strike the unresponsive answer of the witness.

THE COURT: I think the answer is responsive, and your motion is denied.

Q How long were you with him when you were talking?

A I would say over an hour.

Q And during the course of that conversation what subjects were discussed?

A Oh, we discussed our background, our criminal background. He discussed --

Q You discussed your criminal background?

A His.

MR. NAFTALIS: Your Honor, Mr. POllack interrupted the witness.

A (Continuing) His: where he met Mr. Peters. That's where he met Mr. Peters: in Greenhaven Prison.

THE COURT: Mr. Horowitz, you didn't hear the question, evidently. He wanted to know whether he, meaning this other person, discussed your criminal background with you at that time.

THE WITNESS: Yes; he did.

Q Did you tell Mr. Heimerle you had had a history of being in jail for the crime of forgery?

A Yes; I believe I did.

Q And what was discussed? Was there any discussion regarding these counterfeit bills?

A There was another discussion, mainly at that particular time, of bearer bonds, did I have any connection to

get rid of bearer bonds. I happened to tell him at that particular time that my relatives were in the Wall Street business, Carl Marks & Co.

Q. Have you ever, to this day, seen any bearer bonds?

A. No.

Q. Now, in relation --

A. I saw a Xerox copy of the back of one. That's all I saw.

Q. On that evening?

A. No; not on that evening.

Q. That evening, did you see a bearer bond?

A. No.

Q. Did you see any counterfeit money on that evening?

A. No.

Q. Were any denominations discussed with you on that evening?

A. Of the amounts, no. Of counterfeit money?

Q. Yes.

A. No.

Q. When was the next time you saw Mr. Heimerle?

A. At some future date, when he happened to come --

Q. How long after the first meeting --

MR. NAFTALIS: Your Honor, he didn't finish his answer.

A. Approximately about a week thereafter and at that time.

Q. About a week after?

A. Correct.

Q. Where did this meeting take place?

A. Near the front of my home.

Q. And your home was where?

A. At 3278 Steinway Street.

Q. And who else was present?

A. Mr. Peters.

Q. And how did the meeting come about?

A. Well, they figured it would be advantageous --

Q. How --

A. You don't let me answer.

MR. POLLACK: Your Honor, I asked for an answer.

THE COURT: If you will wait for an answer, you will get it.

THE WITNESS: That's correct.

THE COURT: But you can't come in with a second question before you have the first one answered. Now, step back to the lectern there and let him answer your questions.

A (Continuing) Mr. Peters had arranged this second meeting.

Q. Did he call you?

A. I don't believe he called me, because I had no telephone.

Q. Did he come to your house?

A. Yes.

Q. How long after the alleged m eeting in Carruthers' Bar did Mr. Peters come to your house?

A. Less than a week.

Q. Do you remember the day of the week?

A. I don't have the best mind in the world, but it would take a fantastic mind to answer your question.

MR. POLLACK: Your Honor --

THE COURT: All right.

THE WITNESS: Because how can I remember a certain time --

THE COURT: Mr. Horowitz, you just do the best you can. If you can't answer a question, tell him you can't answer it, but we will understand that he is asking questions that are proper, because I am allowing them, and that you are giving him answers as you think they should be answered.

Now, what is your question?

Q. Do you remember the day of the week?

A. No; I don't.

Q. Do you remember the time of the day?

A. No.

Q Do you remember the location of your meeting with Mr. Peters?

A What?

THE COURT: The location. Where it happened.

A (Continuing) Oh, I used to go occasionally over to his house, at 31-60 - 33rd Street. I used to go over there and ring the bell, and he would come down, and we would take a walk or whatever else we had in mind.

Q Is that how the meeting with Mr. Peters came about: that he told you he wanted to meet you with Mr. Heimerle?

A Correct.

Q And how long after that alleged meeting did you have this alleged meeting with Mr. Heimerle?

A Approximately a week. I told you.

Q And approximately what day of the week did it occur?

A I don't recall the date. It was a week end.

Q Where did it occur?

A In front of my house. That's what I told you.

Q What time of the day?

A I would say after supper.

Q What time did you eat supper?

A Six o'clock.

Q And was it dark outside?

A It was beginning to get dark.

Q And this would place it some time after Thanksgiving?

A No. I would say prior to the Thanksgiving.

Q And can you tell us what Mr. Heimerle was wearing on that occasion?

A I don't exactly remember his attire at that time.

Q Did he still have the boatee?

A I believe he did have a little, you know --

Q Was he wearing an outer coat?

A What?

Q Was he wearing an outer coat?

A Well, he was in the car. I think he had one of these trench coats, not on him but in the back of the car.

Q What type of car?

A A black car.

Q What make?

A I believe it was a Pontiac.

Q Was it a new car?

A No; a used car.

Q Who else was in the car with you and Mr. Heimerle?

A Mr. Peters.

Q Where was Mr. Heimerle seated?

A In the driver's seat.

Q And where were you seated?

A Where was I seated? In the back. Mr. Peters sat

next to Mr. Heimerle.

Q So you were looking at Mr. Heimerle the entire time?

A Correct.

Q Did he turn around and look at you?

A Yes.

Q Were you under a light?

A Under a light? No.

Q Did you have good vision? Could you see him?

A Oh, yes. I could see him. He could see me quite well.

Q Was any counterfeit money given to you on this occasion?

A No; but he presented me with certain counterfeit money, showed me.

Q He showed you what?

A These yellow tinted bills. And Mr. Peters made a remark, "Only Ray Charles would take something like that."

Q Was this one of the bills given to you?

A One of the samples that were shown to me.

Q Was this bill Government Exhibit 1 in evidence?

A This was given to me at the time I went to Gimbel's.

Q But this was not given to you, to your knowledge, at the time of the evening in question?

A. How could I know? There was a whole bunch of counterfeit money. How could I tell which one was which?

Q. And you are an expert on counterfeit money?

A. I'm not an expert, but I know counterfeit money quite well.

Q. How do you tell counterfeit money?

A. One of the best ways, you take a legitimate bill and rub it. If the color don't come off, that's legitimate. Another way, you take it and put it up to a light. If you see the streaks there, blue and green streaks. The other way, if you can see the eyes properly, that's a good bill.

THE COURT: What do you mean? Which eyes?

THE WITNESS: The eyes.

THE COURT: Of the picture?

THE WITNESS: Yes. Those are the three main ways that I know of detecting a false bill.

Q. And you have learned these over the years; is that correct?

A. Yes.

Q. And you have learned these over the years to avoid dealing in counterfeit bills?

A. Yes.

Q. And you know that it is against the law to deal in counterfeit bills?

A. Yes.

Q. And you want to know about them, so you will be able to succeed in doing it?

A. Well, anybody wants a fifty-fifty chance, if they have any larceny.

Q. So you wanted to get the best quality you could find?

A. Correct.

Q. Were you given any bills on that evening?

A. No.

Q. Were able to run all the tests you have just gone through to ascertain the legitimacy of the bill?

A. As I told you, the remark was passed by Mr. Peters that --

Q. I didn't ask you that.

A. Well, I'm just answering.

Q. Did you run any of the tests?

A. No.

Q. Now, sir, were those bills folded or straight? Were they folded or straight?

A. Straight.

Q. And were they being carried, did you say?

A. They were being carried in the back of his car, in the trunk of his car.

Q. So he got out of the car?

A. Who? He -- prior to the time that I come into the car, he had already had some of them in his possession.

Q. Mr. Horowitz, when you got into the car and you said you saw hundred-dollar bills; correct?

A. He had some of them in his possession, and he wanted to show me additional. He went to the trunk of his car.

Q. The bills that he had in his possession, according to your testimony: where were they in his possession?

A. In the pocket of his jacket.

Q. The inside pocket?

A. Naturally, the inside pocket. He didn't want to expose them.

Q. And so they were taken out of that pocket in your presence?

A. Correct.

Q. Now, sir, you say he went to the trunk of the car?

A. Yes. To obtain additional ones that he had in the trunk of his car.

Q. This is on a busy street in Queens; is that correct?

A. A busy street in Queens, correct.

Q. And the trunk was open?

A. No, no. He opened it.

Q. It was opened?

A. Yes.

Q And hundred-dollar bills were taken out?

A In a package. He had it already prepared.

Q And brought into the car?

A And brought into the car.

Q And you went over these bills also; is that correct?

A I went over them. I mean, I scanned them.

Q They were handed to you at the back seat, or in the back seat?

A Correct.

Q Did you take any of the bills on that occasion?

A Did I take them? No.

Q Did you put any of them in your pocket?

A No.

Q Did you touch them at all?

A Not all of them. I imagine I touched them.

Q And your fingerprints would be on those bills?

A How could I -- I tipped them this way (indicating). Some of them might have my fingerprint.

Q And you didn't leave the car with those bills?

A No.

Q And you didn't run any of the tests you have described on those bills?

A No; I had no reason to.

Q And you testified that Mr. Peters asked you to do

something with those bills?

A. Mr. Peters asked me to do so mething with those bills?

Q. Correct.

A. At that time?

Q. Yes.

A. No; he didn't ask me. He said, "Do you think I could find customers for these particular bills?"

Q. And you went out to look for customers?

A. Well, as you say, I had connections in the illegitimate field; so I went, and I asked these different people if they would be interested.

Q. How often did you see Mr. Peters during this time period?

A. I saw him every day.

Q. Was he employed?

A. No.

Q. How did he support himself?

A. He was getting a sort of a compensation from the Steel Workers. He was a lathe operator, and he was getting some $190 and some-odd.

Q. And that was his only source of income, that you know about?

A. Well, to my knowledge; but I didn't sleep with him.

I didn't find out whatever else he was doing. It was none of my business.

Q Now, when were asked for a person to buy these bills, were you told what profit you would get for your efforts?

A No, no business arrangement at all.

Q Do you know what Mr. Peters was going to get from the sale of the bills?

A No. I wasn't aware, and I didn't ask.

Q So to you it wasn't a business proposition; correct? It wasn't a business proposition to you?

A It was. I figured that this man, knowing him, would take care of me, as you might say, financially.

Q But there was no agreement to take care of you?

A No; no written agreement, no.

Q Now, when is the next time you state you met my client?

A I met him several times.

Q The next time, sir.

A I met him several times, as I said, prior to his going back to the hotel.

Q The next time after this meeting outside your house, sir.

A I saw your client, all told, maybe six or seven times. I don't remember exactly the next time.

Q. Do you remember where you met him the next time?

A. Yes; I remember now. I recall it. He was with Mr. Peters at Carruthers' Bar, the same bar. They said, "Go out and get for me a ten-dollar ticket on the Exactas."

I figured they were nice. I went out and get the ticket. Then I find out later --

Q. Excuse me. That happened at what bar?

A. Carruthers'.

Q. And how long was my client present there at that time?

A. I was there only about five minutes when they asked me to get the ticket.

Q. Did you come back to the bar?

A. Yes.

Q. And was my client there?

A. Yes.

Q. How long were you with them at that time?

A. Oh, I spent almost two hours with them at that time.

Q. How long after the meeting outside your house did this meeting take place?

A. I can only judge about maybe two weeks.

Q. Two weeks later?

A. Yes.

Q. And how was my client dressed on that occasion?

A. You mean -- you keep insisting on the dress --

MR. POLLACK: Your Honor --

THE COURT: Just tell him if you remember.

THE WITNESS: I don't remember.

Q. How were you dressed on that occasion?

A. I don't even recall that.

Q. Did you sit down at the bar on that occasion?

A. I told you, they asked me to go out to the OTB office and get a ticket for them, a ten-dollar ticket. I went there. It took maybe twenty minutes for me to go there and come back. In the mean time, they had somebody there who didn't -- whom they didn't want me to see.

MR. POLLACK: Your Honor --

THE COURT: You weren't asked any question about that.

Go ahead.

Q. When you came back, was my client seated at the bar?

A. Yes.

Q. And did you sit down with him?

A. Yes.

Q. For how long were you seated at the bar with my client?

A. I figure an hour. And then we went out and we

talked outside in his car.

Q. Was it the same Pontiac?

A. Yes.

Q. Black?

A. Black.

Q. How was my client dressed? Did he have an overcoat on, that day?

A. What are you, trying to get my goat or something? Counselor, I can't understand. You keep insisting on attire.

MR. POLLACK: Your Honor, if he doesn't know --

THE COURT: Mr. Horowitz --

THE WITNESS: I don't recall.

THE COURT: He is entitled to ask that question as many times as he wants to, if the occasions are different. If you didn't make any particular observation of the man at the time, why don't you tell him that?

THE WITNESS: I didn't, as your Honor is so kind to answer for me.

THE COURT: I didn't answer for you. I merely suggested if you don't remember, tell him.

THE WITNESS: I don't recall the exact attire that the man had. I didn't pay attention. I wasn't interested in his attire. He's not a woman. I was interested in the

financing thing.

THE COURT: Next question.

Q. Mr. Horowitz, how were you dressed on that occasion?

THE COURT: Ask it once more, and that will be it.

A. I don't really know.

Q. How long did you sit in the car with my client?

A. Oh, about an hour. Almost an hour. And then he reminded himself he's got to rush back at eleven o'clock.

Q. Did you sit right in front of the bar? Was the car parked right in front of the bar?

A. No; he never parked right in front of the bar.

Q. Where was it?

A. Around the block.

Q. Was there on-the-street parking around the block?

A. Yes.

Q. And you at that time were in the car, and who else was in the car?

A. Mr. Peters.

Q. Where did you sit in the car on that occasion?

A. In the back. Usually sat in the back, and Mr. Peters sat right next to Mr. Heimerle.

Q. Were you given the bill which is Government Exhibit 1 in evidence? Were you given the bill on that occasion?

A No, no.

Q As of this date, had you negotiated the sale of any money?

A No.

Q When was the next time you saw my client?

A The next time, I believe, to the best of my knowledge, was when we took a ride with Mr. Warme, up to meet Mr. Warme at the Cross County Diner.

Q And when was that, sir, in relation to the meeting at the bar?

A Oh, about a week, a week later. It was on that particular day. It was on a Sunday.

Q And where did you meet? Where did you say you met my client?

A I met him in Astoria with Joe Peters, whom we drove up to Cross County Diner.

Q Was this a pre-arranged meeting?

A Yes, because I had called Mr. Warme.

Q And had you called Mr. Peters?

A No. Mr. Peters had a habit of, I would go over to his house or he would come over to my house.

Q Now, sir, on this occasion, how long had you been with my client?

A On this --

Q On this occasion?

A On Sunday?

Q Yes.

A I would say about four or five hours.

Q And was this before or after Christmas?

A Before or after Christmas? Before Christmas.

Q How do you say you got to the Cross County Shopping Center?

A Mr. Heimerle's car.

Q How was my client dressed for that occasion?

A He's always quite an immaculate dresses, always quite well dressed.

Q And do you remember what he was wearing on this occasion?

A Wearing a suit. He usually wears a suit.

Q Was he wearing an overcoat?

A No. Not to my knowledge.

Q How about his hair? Was it still long?

A Yes; it was fairly long, but he occasionally had it cut short, you know. Not at that particular time, but he did cut it short, eventually.

Q Well, on this occasion --

A And he cut the goatee off.

Q On this occasion did he have the long hair and a

goatee?

A. Yes; he had long hair.

Q. And you were with him for four or five hours?

A. Yes.

Q. And during this time were you given Government Exhibit 1?

A. No. I was never given that until Gimbel's, and he wasn't the one who gave it to me. Mr. Peters is the one who gave me that bill.

Q. And you testified there were how many people present at the Cross County Shopping Center?

A. Four people.

Q. And where were you?

A. Where was I?

Q. Yes.

A. In relation to what?

Q. What type of building? Were you in a building?

A. I went up there in his car.

Q. When you got there --

A. We sat there, and then we went into the diner and had a little bite there, and then I said to Mr. --

Q. Do you remember the name of the Diner?

A. Cross County Diner.

Q. Where was that located?

A. It's on Mapham Avenue and Yonkers Avenue, in Yonkers.

Q. And did you arrange that as a meeting place?

A. Yes.

Q. And did you --

A. I arranged that with Mr. Warme. It would be easier for him to go there.

Q. After you left the diner, you testified you went where?

A. Went right out to his car, Mr. Warme's car. He had a blue Cadillac there.

Q. Did you leave from there, and did you go somewhere?

A. Yes. We went from there to Dobbs Ferry -- that's where we went to the garage.

Q. How did you get there?

A. How did I get there, to the garage?

Q. Yes, sir.

A. I went with Mr. Heimerle, and Mr. Peters went with Richard.

Q. So now you were in the front seat; correct?

A. Front seat; right.

Q. Were you wearing an overcoat?

A. I believe I was wearing a jacket.

Q. Was it cold?

A. Yes. It was fairly cold, yes, but it wasn't -- it was a nice day out.

Q. How long before Christmas was this Sunday, sir?

A. I can only estimate.

Q. The best approximation you have.

A. About a week or so before Christmas.

THE COURT: Are you about through?

MR. POLLACK: I will be a little longer, your Honor.

THE COURT: A little longer than what?

MR. POLLACK: Now.

THE COURT: Are you going to be able to finish up before the luncheon recess or not?

MR. POLLACK: I don't know, Judge.

THE COURT: I see.

All right. We will take a recess now, ladies and gentlemen, until two o'clock. You are excused for lunch.

(The jury left the courtroom.)

MR. WEINGARD: Your Honor, before we have a recess, may --

THE COURT: We are in recess now.

MR. WEINGARD: Will you take an application from me before the jury returns?

THE COURT: Make your application at two o'clock.

(A luncheon recess was taken.)

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AFTERNOON SESSION

2:00 p.m.

(In the absence of the jury:)

THE COURT: Did you want to bring something to my attention, Mr. Weingard?

MR. WEINGARD: Yes, your Honor.

As the Court is aware, my client is present. He arrived at approximately twenty after one this afternoon. The reason for his tardiness is that his wife began to hemorrhage, and he had to rush her to the hospital. He had no one to leave his several young children with. He was unable to get down here until that hour.,

I am sure what I have told the Court is an honest accounting of what occurred. If you have any other questions, my client would be glad to answer them.

I would make an application to vacat his bench warrant, and I would further make an application to reinstate bail, with the assurance that, barring unforeseen occurrences, such as happened this morning, there will be no such situation as developed during the course of this trial.

THE COURT: Well, there seems to be an infection prevalent in this case of lawyers and defendants taking matters into their hands and without a by-your-leave absenting themselves, without notifying anybody what they are doing.

Now, this man didn't do anything about any of the things that you are reciting until he learned that there was a marshal out looking for him at half past eleven.

MR. WEINGARD: Your Honor, if I may, with respect to the telephone problem, as your Honor has been informed this morning, my client does not have a telephone in the house. There is no telephone --

THE COURT: You say yourself that he was at the hospital at nine o'clock. He didn't call your office. He didn't call the clerk of the court. He made no effort at all to do any of the things that he should have been doing. He did: he followed the example of the lawyers and just disappeared and assumed that everybody would stand buy for him.

MR. WINGARD: Your Honor, may my client make some remarks, if he can, to the Court to explain his action?

THE COURT: Yes.

DEFENDANT WARME: Your Honor, I did call the Court this morning.

THE COURT: What time?

DEFENDANT WARME: I think it was ten-thirty.

THE COURT: You are sure it wasn't eleven-thirty?

DEFENDANT WARME: I called the Clerk, and they said that the trial was on and they couldn't interfere. And I called your office at twenty after eleven and spoke to your

secretary.

THE COURT: What happened between ten-thirty and twenty after eleven?

DEFENDANT WARME: I assumed they couldn't reach you.

THE COURT: In a certain sense I don't blame you, after hearing how your lawyers behave, thinking that you had the same license.

I will overlook it this time, but if there is any infraction, if you don't show up on time during the remainder of the trial and you aren't available, it will be dealt with at that time.

Bail is reinstated and the bench warrant is vacated.

DEFENDANT WARME: Thank you, your Honor.

MR. WEINGARD: Thank you, your Honor.

THE COURT: All right. Bring in the jury.

(Jury in box.)

B E R N A R D H O R O W I T Z , resumed.

CROSS-EXAMINATION

BY MR. POLLACK: (Continued)

Q. Mr. Horowitz, what is the last date you claim to have seen James Heimerle?

A. The last date I claim to have seen him was the day, the Sunday that I went up, went up to Irvington.

Q. Now, sir, you testified you went to Caesar's

A. Yes.

Q. And the agents asked you some questions, didn't they?

A. Yes.

Q. Now, after the very first interview you had at 2 World Trade Center, there came a point, I assume, when you went back to these agents; is that correct?

A. They called me. What was I supposed to do?

Q. This was after you were arraigned, they contacted you?

A. Correct.

Q. You didn't have a lawyer at that time?

A. No.

Q. But you spoke with them at that time?

A. Yes.

Q. Why did you change your story?

A. Change what story?

Q. The story that you had nothing further to say?

A. Because I realized the contents of what I was facing. There was a confession on the one hand. On the other hand, Mr. Heimerle sold three times to an undercover agent. I figured I was dead to rights. What else could I do?

Q. That's what they told you; correct? That's what the agents told you had happened?

A. Well, I assumed that to be the truth, because they

Q "Q Did there come a time, however, Mr. Peters, that you came to discuss counterfeit currency with Mr. Heimerle?

"A Yes. That was a very short time later, yes."

Do you recall that question and that answer, Mr. Peters?

MR. WEINGARD: Your Honor, before that question is answered, I would object to this procedure. I don't think there has been an exhaustion of the witness' recollection.

THE COURT: Overruled. The witness said he didn't remember, and we are going into this subject.

THE WITNESS: Can I ask a question, your Honor, and then I will be quiet during the rest of the trial.

THE COURT: No. We don't want you to be quiet. We want you to answer questions.

THE WITNESS: Just let me say --

THE COURT: You may say something inadvertently, not because you intend to do it, which would in some way mar the propriety of this trial. So I have to ask you to just follow the rules as we follow them, you know.

THE WITNESS: Yes; I understand, but I want to be careful.

THE COURT: In every army there has to be one leader and lots of privates. Now, you are a private here.

Don't try to be the general.

THE WITNESS: No; I don't want to be the general. I just want to say this --

THE COURT: Here: I am telling you what to do. The lawyer asked you whether before the grand jury that question was asked and that answer was given. Do you remember that?

THE WITNESS: Yes.

THE COURT: Was your answer true at the time it was given to the grand jury?

THE WITNESS: Yes.

THE COURT: All right.

THE WITNESS: But may I say something now?

THE COURT: No.

THE WITNESS: It was -- I believe that this whole trial is pretty puch -- this man gave a confession.

THE COURT: Please. I don't want you to say anything.

THE WITNESS: All right.

MR. WEINGARD: Your Honor, I most respectfully move for the declaration of a mistrial.

THE COURT: And, respectfully, I deny it.

MR. POLLACK: I join in that motion.

THE WITNESS: Okay. Go ahead.

THE COURT: Now, you just behave yourself here and

answer questions.

The jury will disregard everything that this witness has said other than his answer that he gave, acknowledging that he was asked that question and gave that answer, and he says it was true.

Now, ask the next question and proceed so that we don't get interruptions.

MR. NAFTALIS: Thank you, your Honor.

Q Did there come a time that Mr. Heimerle showed you the counterfeit hundred-dollar bills?

A Yes.

Q And what if anything did he say to you concerning these counterfeit hundred-dollar bills?

A What did he say?

THE COURT: Yes.

Q Yes.

A He said that they were given to him. That's what he said.

Q And did Mr. Heimerle indicate what he wished to do with these counterfeit hundred-dollar bills?

A Yes. He wanted to sell them.

Q He told you he wished to sell them?

A Get rid of them, sure. You know, sell them.

Q And did he make any request of you at that time?

A. Make a request of me at that for what?

THE COURT: Did he ask you to do anything?

THE WITNESS: Well, that's all in Warme's confession.

THE COURT: Now, please. I am going to hold you in contempt if you don't answer these questions properly. You have no right to say anything in this court other than the proper answers to the questions.

THE WITNESS: All right. Go ahead.

MR. WEINGARD: Your Honor, I object --

THE COURT: This jury isn't interested in anything you say other than your legal statements in answer to questions that are asked of you.

THE WITNESS: This is the first time in my life I ever was on the stand.

THE COURT: That's all right. I am telling you to behave yourself.

MR. WEINGARD: Judge, before the next question is asked, I most respectfully ask that a juror be withdrawn and that there be a declaration of a mistrial.

THE COURT: Absolutely not. The motion is denied.

MR. WEINGARD: Exception, sir.

THE COURT: You don't have to except, and you know that you don't have to except, and don't indulge in any theatrics here.

THE WITNESS: All right.

Q. Mr. Peters, did Mr. Heimerle indicate anything further to you in respect to his desire to sell the counterfeit?

A. Yes. We -- we went, you know, went to see somebody to sell them.

Q. And who was the somebody you went with him to see?

A. It's all -- I'm sorry -- right there.

Q. Who is there?

A. I believe that's Richie. Let me take a look. Yes. That's right.

THE COURT: What was the name of the man you went to see?

THE WITNESS: Richie. I called him Warner, but his name is Warme.

THE CLURT: All right.

Q. Did there come a time when you went with Mr. Heimerle to meet Mr. Warme?

A. Yes.

Q. Was there anyone else with you when you went to that meeting?

A. Yes.

Q. And who was the other person?

A. Bernard Horowitz.

A. What was --

Q. What was he supposed to do with this counterfeit hundred-dollar bill?

A. Well, meaning he was going to break the hundred dollars in the store. I said, "You may as well get a blanket. Get an electric blanket." So he went in and bought an electric blanket. I was standing close by, watching it. He put a blanket on the counter, and the girl walked away, and give minutes later she came back with two detectives.

MR. WEINGARD: Objection.

THE COURT: Well, from what we know about it, it is true, I guess, but the objection is sustained.

(To the witness:) Unless you were there --

THE WITNESS: I was there. I'm not guessing.

THE COURT: You were there?

THE WITNESS: Yes. From here to where you are, I was standing.

THE COURT: At the counter?

THE WITNESS: Yes. As near as to where you are, I was standing.

THE COURT: All right. Excuse me. The objection is overruled. The testimony stands.

MR. NAFTALIS: Thank you, your Honor.

Q. Now, Mr. Peters, where did that hundred-dollar bill

Q Now, Mr. Peters, during November and December of 1975, you had a number of conversations with Mr. Heimerle. Do you recall that?

A Yes; sure.

Q And during the course of those conversations, did there come a time when Mr. Heimerle discussed with you the printing of the counterfeit currency that he had shown you during this period of time?

A That what?

Q Let me rephrase the question, Mr. Peters.

Did there come a time that Mr. James Heimerle told you or spoke to you about the printing of the counterfeit money in question?

A Yes.

Q And what if anything did Mr. Heimerle tell you about the printing of this counterfeit money?

A Well, it was quite obvious that it was being printed up.

THE COURT: He wants to know what Heimerle told you. It calls for a conversation. Do you remember what he told you?

THE WITNESS: Yes; right. Yes. He just said that they had a plant where they were doing it, and they were making up menus, and that was it.

Q. Did he say they were printing menus or they were printing counterfeits?

MR. POLLACK: Objection.

A. Both.

THE COURT: Sustained.

THE WITNESS: Both. One was a front for the other.

THE COURT: Strike out the answer.

Q. Mr. Peters, what did Mr. Heimerle tell you about the printing plant for the counterfeit?

MR. POLLACK: Objection.

THE COURT: Sustained.

A. Nothing.

MR. POLLACK: Move to strike.

THE COURT: Strike it out.

I am sustaining these objections on the ground of form.

MR. NAFTALIS: I understand, your Honor.

THE COURT: Did you talk to this man about the printing and the printing shop? Did you have a conversation with him about printing?

THE WITNESS: Yeah.

THE COURT: Did you talk to him about the printing shop?

THE WITNESS: The printing plant it was, the shop.

A. No, not really. Just that it was a place that was a front for making menus, printing menus.

MR. NAFTALIS: Your Honor, may I refresh the witness' recollection?

THE COURT: Just go right ahead. I think that the detail that you are going into is thoroughly unnecessary, and your questions are prolix and strain the witness' understanding. You have to limit your questions to his capacity to understand.

Q. Did Mr. Heimerle indicate to you whether or not he was involved in any way in the printing plant?

MR. POLLACK: Objection, your Honor, as to form.

THE COURT: Sustained.

Q. Did Mr. Heimerle state --

MR. NAFTALIS: Withdrawn.

Q. Did Mr. Heimerle state anything to you concerning the ownership of this counterfeiting plant?

MR. POLLACK: Objection as to form.

THE COURT: Sustained.

Q. What if anything did Mr. Heimerle say to you about the ownership of this printing plant?

MR. POLLACK: Objection.

THE COURT: Overruled.

MR. POLLACK: Your Honor --

THE COURT: Overruled.

A. Will you repeat that, please? I don't get you.

THE COURT: He wants to know what if anything he told you about the ownership of the plant.

A. (Continuing) Well, the ownership --

THE COURT: What did he tell you?

THE WITNESS: Well, I'll have to think, now. This is a long time ago.

THE COURT: All right. You think.

THE WITNESS: He had a place. He had two guys working there. He told me that. They had a place where two guys were working, and they could only work a little at a time. They couldn't work late, because the neighbors were complaining.

MR. NAFTALIS: May I have a moment, your Honor?

(Pause.)

Q. Mr. Peters, what if anything did Mr. Heimerle tell you about the location of this printing plant?

A. James Heimerle never, never told me where the plant was. I only assumed that it was in Brooklyn.

MR. POLLACK: Objection.

THE COURT: Strike out the assumption.

THE WITNESS: I'm sorry.

A. (Continuing) He never told me nothing, nothing like

THE COURT: When you use the word "related", you create an ambiguity. That is what causes the trouble.

Now, how is it related? Is it related only because it is a counterfeit matter?

MR. NAFTALIS: No, your Honor. One deals with an active investigation before the Federal grand jury now, which includes as one of the possible targets one of these defendants, and the other deals with the matter of Mr. Joseph Corbo.

THE COURT: Does it have anything at all to do with the direct examination of any witness?

MR. NAFTALIS: No; it does not, your Honor.

THE COURT: Very well. That will end the subject of 3500 material.

Now, the only other question will be Brady material. Is there any Brady material in here?

MR. NAFTALIS: There is no Brady material in here.

THE COURT: On the strength of the prosecutor's statement that there is nothing here that relates to the direct examination of the witness about to be called or who has been called, whichever the 3500 material refers to, I will rule that everything that has been turned over has been turned over, and I will see to it that any material that is questionable is identified so that if there is any aftermath

of this case it will be available.

Get the jury.

MR. POLLACK: Your Honor, may I bring one more point to the Court's attention?

Your Honor, prior to beginning trial, Mr. Naftalis provided me with what purported to be a confession by co-defendant Richard Warme. In that confession there is a mention made of my client, James Heimerle, which of course creates problems under Bruton.

Mr. Naftalis informed me immediately prior to trial that it was his intent to offer a redacted form of the confession to avoid the problem.

This morning I was given a copy of the proposed redaction.

THE COURT: Is it sufficiently redacted?

MR. POLLACK: I don't believe it is

THE COURT: Give me the parts with an indication in red pencil, and I will take care of it promptly.

MR. NAFTALIS: Your Honor, would you like to have the original for comparison?

MR. POLLACK: I am sending both up, Mr. Naftalis.

THE COURT: Do you have any objection to having the document redacted further so as to eliminate the parts that Mr. Pollack has bracketed?

MR. NAFTALIS: I certainly do, your Honor.

THE COURT: Pass it up here. I will redact the document as requested by the lawyer for Heimerle.

MR. NAFTALIS: Your Honor, I will have the redacted document typed up --

MR. POLLACK: Your Honor, the word "and", which precedes the brackets, I assume will be taken out.

THE COURT: No; I am not going to take the word "and" out. I am just going to take "the other guy" out. As long as there is no reference to your client in here by implication in anything that is stated, you have gotten as much as you are entitled to.

MR. POLLACK: Your Honor, one thing I did not bracket was the last paragraph of the first page of the redaction concerning the conversation.

THE COURT: I am not going to let you string this out like a piece of taffy. You have given me what you wanted and I have ruled on it.

MR. POLLACK: Your Honor, you are on that paragraph now. This is on the paragraph the Court struck out this morning. The conversation about the printing shop and the late night printing, which again identifies my client by the fact that the witness has already mentioned it before this jury.

THE COURT: In other words, you say that there is a connection, but is the connection stated here?

MR. POLLACK: Your Honor, I believe in the context of this trial it is very obvious to the jury --

THE COURT: Nothing is obvious other than your concerns, which I don't think are properly founded. I will look and see what you are talking about after I have finished the thing that you first gave me.

Now, what paragraph do you refer to?

MR. POLLACK: The last paragraph on that page, starting with "Three days later".

THE COURT: What are the words that you want out?

MR. POLLACK: "During the conversation" to the end of that paragraph.

THE COURT: There is nothing wrong with "during the conversation". It doesn't identify a conversation with your client in any way.

MR. POLLACK: No, your Honor, but it talks about a printing plant, which there has been comment about in this trial and alleged to have been my client's, and I cannot cross-examine Mr. Warme on that and the connection thereto. By implication, it identifies my client.

THE COURT: There is no such implication.

MR. WEINGARD: Your Honor, before we bring the jury

in, I have an application.

The way this statement is redacted has an impact upon my client as well.

THE COURT: Is it your client's statement?

MR. WEINGARD: It is being attributed as my client's statement, yes.

THE COURT: What do you want to do? Wave it away with a wand or something?

MR. WEINGARD: I am not following the Court. I will just tell you what my position is and what troubles me about it.

One of the strategies of the defense in representing Mr. Warme is that what happened here is that the agents, according to our position, dictated a statement which he refused to sign, based on the knowledge and information that they had available to them because on their other investigation and what other people may have said to them.

THE COURT: Well, that is a theory that you propounded, which I did not accept.

MR. WEINGARD: Yes. I appreciate that the Court did not rule in our favor at the preliminary hearing. However --

THE COURT: And as a matter of credibility, I found against your client on that very subject.

MR. WEINGARD: But, of course, the jury would have an opportunity, if I would broach those subjects during the course of my examination of the agents, to consider that along with the other acts.

THE COURT: I cannot prevent you from opening the door to any subject that you want, and I don't intend to do so.

MR. WEINGARD: What I am saying, Judge, is that if this statement is redacted in the fashion that is now being proposed, there will be an impact on the strategy that Mr. Warme intends to utilize in connection with the way in which this statement was constructed by the agents. It therefore has impact on him, and I think that it probably cannot be redacted at all in any favorable sense.

THE COURT: Well, I think that that is a specious argument -- meaning no offense to you in the manner in which I state it -- and has no substance to it at all.

MR. POLLACK: Judge, may I see the redacted statement to be sure I have indicated all portions that I wanted to --

THE COURT: I am not sure about the last sentence on the last page. Is it the last full sentence on the last page that you are asking to have go out?

MR. POLLACK: No. I think it would be the last two.

THE COURT: I am not going to take the next to the last full sentence out, because it merely refers to the time the printing occurred and the noise that the printing occasions and has nothing whatsoever to do with a Bruton problem.

Now, how has the final sentence anything to do with a Bruton problem, which refers merely to the ownership of the print shop? What is the connection of your client with the ownership of the print shop?

MR. POLLACK: None, your Honor.

THE COURT: Well, how does it raise a Bruton problem there?

MR. POLLACK: Your Honor, because they are alleging the statement to or attributing the statement to "the other guy", which was redacted.

THE COURT: Well, suppose we take out the words "He also stated that", and just leave the balance of it in, which has nothing at all to do with an identification of a person.

MR. WEINGARD: Judge, what that has the impact of doing to Mr. Warme is then making it appear as though Mr. Warme --

THE COURT: Mr. Warme has no rights in the subject, because this is Mr. Warme's statement, and he is available without any Bruton problem. This is a question of the co-

defendant, and I don't see how you get into the picture at all.

MR. WEINGARD: Perhaps I might cite a case. 18 U.S. 2nd, which, as I understand it, is that if the method chosen to redact the statement has an impact upon the person who was the declarant, then the redaction cannot be accomplished either, and what I am suggesting to the Court is that by cutting out these various portions of the statement it then seems to impute that my client had first-hand knowledge of how the printing of these counterfeit notes was being done or how it was taking place. People vs. Labelle.

I think what the Court is trying to leave in is the following quote: "The printing was being done in a print shop that was borrowed from someone else." The impression therefore being that my client --

THE COURT: I don't think that there is anything to this point at all, and it is just silly. Is there any harm in cutting the statement out so as to cut out all the controversy?

MR. NAFTALIS: Your Honor, the Government will go along with the Court.

THE COURT: There is nothing to his point, because it silences a lot of conversation.

MR. NAFTALIS: To save any really frivolous issue,

the Government will consent to the removal of the line.

THE COURT: That whole sentence comes out. That is the last full sentence on the page.

MR. NAFTALIS: But the sentence "This meeting ended" will remain in.

THE COURT: You know, one of the troubles with the way you examine is that once you get a statement you then try to make a rabbinical statement out of it by repeating it in another form.

MR. NAFTALIS: I am sorry, your Honor.

THE COURT: It is the last full statement, the last full sentence on the page. It is a case which the Court considers totally in applicable and made immaterial by the consent of the Government to the redaction.

All right. Here is the redacted item. Let's go on with the case. I want to finish this afternoon.

MR. NAFTALIS: Judge, the United States is limiting two of the witnesses to try to speed this trial along and will expect to be able to finish the case this afternoon. However, we have one small problem. One of our major witnesses, who must testify, is being released from the hospital late today.

THE COURT: What was his illness?

MR. NAFTALIS: He had surgery, your Honor, on the

urinary tract. That is my understanding.

THE COURT: I see. And he will be released today?

MR. NAFTALIS: That is my understanding, your Honor.

THE COURT: We will hear him first thing in the morning.

MR. NAFTALIS: Thank you very much.

MR. POLLAC: Judge, there is "one other guy" at the end of the last paragraph, which I ask the Court to take out.

MR. NAFTALIS: Your Honor, may I inquire of the Court: does the Court wish that this page be retyped?

THE COURT: No. If you want me to, I can have the clerk take it out and get it photostatted so it won't show the tears. He will do that. He will go out when one of the witnesses is on the stand, and that will be done.

MR. POLLACK: Judge, may I leave the original and the cover page?

MR. NAFTALIS: We have the original and the other pages.

MR. WEINGARD: Your Honor, before the jury comes in --

THE COURT: The jury is coming in. I am through. The case has been stalled sufficiently. If you have anything further, just write out a note and send it up.

THE COURT: Did the Government say that they would put him on?

MR. WEINGARD: No, but he was in court. He was the case agent on the case, and I --

THE COURT: None of that is a cause for a continuance, and if you want to play games with your imagination, I can't help you.

Bring in the jury.

MR. NAFTALIS: Your Honor, the Government has one application. The Government expects to offer this morning as evidence copies of three convictions of Mr. Heimerle, one before Judge Metzner in this court this spring --

THE COURT: Under what theory can you offer those convictions in the Government's case?

MR. NAFTALIS: Your Honor, these are prior and subsequent acts of the defendant Heimerle with respect to counterfeiting.

THE COURT: What authority have you got for offering that in the Government's case?

MR. NAFTALIS: Your Honor, if the Court will just bear with me -- your Honor, I would think under Rule 405, subsection (b), specific instances of conduct in cases where the conduct or a trait of character of a person is an essential element of a charge, claim or defense, proof

may also be made of specific instances of his conduct; and, your Honor, where the defendant is charged with being involved in conspiracy to distribute counterfeit, subsequent and prior conspiracies that he was involved with and substantive offenses of an identical nature certainly are evidence of a character trait, intent, knowledge and the rest.

THE COURT: I asked you to cite some authority, Mr. Naftalis.

MR. NAFTALIS: Your Honor, I am citing the Federal Rules of Evidence, Rule 405.

THE COURT: Have you a case where any such thing has been allowed in the Government's presentation of a case?

MR. NAFTALIS: Yes, your Honor. This was done in this very courthouse before Judge Metzner in my prior prosecution of Mr. Heimerle. His prior conviction under Title 18, Section 473, was admitted.

THE COURT: Was any opinion submitted to Judge Metzner?

MR. NAFTALIS: No; it was not required by the Court.

MR. POLLACK: Your Honor, this was brought in through the cross-examination of the defendant on the stand, not during the Government's case in chief.

MR. NAFTALIS: That is not correct, your Honor. I have the trial transcript here. If the Court will bear with

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the Court that under no redaction can the third, fourth and fifth paragraphs of the second page be admitted without prejudice to the defendant Heimerle and thereby --

THE COURT: Well, if it is legal prejudice, I am not concerned, but the question is whether it is erroneous.

MR. POLLACK: No, your Honor. What I am talking about is the references to "they" and "them" coming to a house, the references to let-out situations where other witnasses have put only one defendant in this situation.

THE COURT: I haven't got a copy of what you are talking about.

MR. POLLACK: Your Honor, I will hand up my copy, and if I can use Mr. Naftalis' --

THE COURT: I want the full document. Give me the original, please.

MR. POLLACK: In the fourth paragraph, your Honor, at --

THE COURT: Just a minute. Let me read it.

MR. POLLACK: On that page, your Honor, I am addressing myself to the fourth, fifth and sixth paragraphs.

(Pause.)

THE COURT: All right. This document will be redacted as I have just indicated, and as redacted it will be allowed, with an exception to anybody who wants an exception.

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MR. WEINGARD: Your Honor, I will take an exception as well to the redaction in the form you have indicated.

THE COURT: I have just given you an exception. If you want to state a reason, you may.

MR. WEINGARD: Yes, on the grounds that the alteration in that fashion interferes with the claims being made by my client and distorts, if you will, what purports to be the statement.

THE COURT: Are we ready to go ahead?

MR. NAFTALIS: Your Honor, I have found the portion of the transcript on the Government's direct case where the Government offered and accepted --

THE COURT: I asked you, Mr. Pollack, are you satisfied with the redaction?

MR. POLLACK: No. I think there are still ways where it can be further redacted without identifying my client.

THE COURT: Well, point that out, and bear in mind that I don't want any nonsense.

MR. NAFTALIS: Your Honor, shall I pass up the transcript?

Pages 76 and 77, your Honor.

THE COURT: What was this? Exhibit 17?

MR. NAFTALIS: Your Honor, Exhibit 17 in that in-

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stance if Government Exhibit 8 in this trial. It is a certified copy of the defendant James Heimerle -- a conviction of the defendant James Heimerle under Title 18, Sections 473 and 2, and for conviction --

MR. POLLACK: The defendant raised the issue of lack of predisposition and mistake on the part of the Government's witness. For that purpose, in conformity with the rule, Judge Metzner allowed the evidence in the record, and the defendant subsequently testified to that effect.

I submit that those reasons are not valid in this trial.

THE COURT: No; you are just as mistaken in what you have just said as you were a few minutes ago, when you told me it was introduced in cross-examination.

MR. NAFTALIS: Under the same theory, your Honor, the Government wishes to offer Government Exhibit 7, which is the certified copy of the conviction of that defendant in a certified copy in that very trial, where he was convicted with violating Sections 473 and 371 in respect to the conspiracy to engage in the sale of counterfeit.

The Government asks that Exhibit No. 7 also be admitted under the same theory as Exhibit 8.

MR. POLLACK: Your Honor, for the reasons stated plus the fact that that conviction is already on appeal before

the Circuit Court, the defendant would maintain it is not admissible.

THE COURT: I think I have heard enough. We will allow it in.

(Government Exhibits 7 and 8 for identification were received in evidence.)

THE COURT: Now, you have circled something that I marked out.

MR. POLLACK: Your Honor, the way it reads, the jury won't know, and since my client is the only other one sitting at the defense table, the jury will believe it's him, since everybody else is already involved.

Your Honor, I ask that the original of this statement unredacted be marked as a Court exhibit.

MR. NAFTALIS: The Government has no objection. The Government will note for the record --

(Pause.)

THE COURT: It is pretty clear that these prior similar acts may be admitted when offered to show the defendant's motive and intent.

MR. POLLACK: Your Honor, I don't believe motive and intent are at issue in this case. I think it is an issue of credibility.

THE COURT: You may intent is not an issue in this

trial?

MR. POLLACK: I don't think it's put before the jury in that way, your Honor. Our cross-examination has been totally aimed --

THE COURT: All right. We will allow it in.

MR. WEINGARD: Judge, before we conclude, so that you understand the basis of my objection with regard to the redacted statement, it will be part of my position before this jury to demonstrate the fact that my client did not dictate this particular statement, but rather the statement was dictated by someone other than my client, perhaps with a greater educational background or with a more fluent command of the language.

As the statement read, it was more literate than perhaps a man sitting in an office with several agents could have been, and as redacted now, it seems far less literate, and I suggest to the Court that it causes undue prejudice to my client to permit the statement to go in in this fashion.

If a statement is coming in which purports to be a confession, I submit it should not go in in this particular case, because of the potential prejudice against Warme.

THE COURT: Call in the jury.

MR. POLLACK: Your Honor, you asked for my sugges-

tion. May I make one?

In the last full paragraph, as it reads in redacted form, it reads, "After I met Joe in the diner". What I suggest is that instead of leaving a blank, it should read, "Joe and the other guy". That way, the jury cannot make any inferences from the blanks.

THE COURT: First of all, I can't follow what you are saying, because you haven't given me a copy.

MR. POLLACK: Your Honor, I believe, in the fourth paragraph, it says --

THE COURT: The way it reads now, "About three days later I met Joe at the Tiffany Diner at Fourth Avenue in Brooklyn."

MR. POLLACK: What I am saying is, going up, now, your Honor, the paragraph above that, we have a blank in the third line, "and I did not have money to pay for the package and _____ told me to make the connection."

What I am suggesting is: "Joe and the other guy told me", and cross out "the other guy" so it will read, "Joe told me".

That way, there is no blank, and certainly Joe was one of them. That's the way it was written. Sometimes it's "Joe and the other guy" and sometimes "they".

THE COURT: Your colleague here would say that that

changes that confession.

MR. POLLACK: What I am saying, your Honor --

THE COURT: I know what you are saying. Just a minute.

All right. The way it will read now is, "I did not have the genuine money to pay for the package and would return in about an hour."

MR. POLLACK: Each of the "they" and "them", your Honor, which would leave a blank --

THE COURT: I have left everything else out.

MR. POLLACK: There are a couple of other "theys" and "thems" which are crossed out and would read the same way. It says, II then told them that I did not have" -- is that totally crossed out?

THE COURT: Will you please look at this thing and stop larding the record with a lot of conversation?

MR. NAFTALIS: Your Honor, the Government wishes to put on the record its exception to some of the requests for redaction that the defense is making.

MR. WEINGARD: And, of course, your Honor has my exceptions. Your Honor, so that the record --

THE COURT: Please don't lard the record, will you? I have had enough of this, and I am indulging you beyond reasonable limits.

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MR. POLLACK: Your Honor, I have three points only.

THE COURT: What is that?

MR. POLLACK: Three very short points.

At the end of the next to last full paragraph, before it says $3,000, it says, "I gave _____ the $3,000." What I am suggesting to the Court is that the "them" be read as "Joe and the other guy" and "the other guy" crossed out, so it reads, "I gave Joe the $3,000".

MR. NAFTALIS: Your Honor, I object to that. This is now inserting words in the confession.

THE COURT: Of course.

MR. POLLACK: Your Honor, there is no difference between "them" and "Joe and the other guy".

MR. NAFTALIS: Your Honor, the Government inserted the name "Joe" instead of "Heimarle". The name appeared in the confession.

THE COURT: I am going to say the same thing to you. Please don't lard the record with a lot of conversation. I take it everybody is preparing himself for some kind of elastic argument at another place, where the people who are to review it will not know what the context and the spirit of the whole thing are, and they will see a lot of chatter, which will not be descriptive of anything that is happening

here. Now, please surcease.

(Pause.)

THE COURT: All right. The form in which this is redacted is the form in which it will be allowed --

MR. POLLACK: There are two more points, your Honor. I would like to bring --

THE COURT: That's it. If there are any more points, you will take them up on appeal.

MR. POLLACK: May I put them on the record, your Honor?

THE COURT: Yes. Put everything that you have to say on the record at this time, without any further supplementation or amplification or delay.

MR. POLLACK: Yes, sir.

In the last sentence of that paragraph as I have it on my copy, it would now read -- what I would suggest is that it read, "told Joe I would pay the remainder on the package in three or four days.". In the next paragraph --

THE COURT: That is precisely the way it is redacted. You are just wasting my time.

MR. POLLACK: I am sorry, your Honor. I thank the Court --

THE COURT: I know you are sorry. It is now twenty minutes to eleven, and here you are telling me things

that you have seen that were handed to you five minutes ago in the form in which you now say you want them.

MR. POLLACK: In the third line of the next paragraph, your Honor, I would suggest that the "told them" be redacted to say "I told Joe I did not have". It says, "I told them that" --

MR. NAFTALIS: Your Honor, the Government is going to object to that. There are other people in the record than Mr. Peters.

THE COURT: I am giving you a total objection to everything that is going on. Please do not say anything further.

Now, I will have this sent upstairs and have my secretary type it up in its redacted form, to be brought out --

MR. WEINGARD: Will there be dot marks to demonstrate the redaction?

THE COURT: No.

MR. WEINGARD: So it will read as one continuous document.

THE COURT: When you see it, you will know what it is like.

MR. NAFTALIS: Your Honor, the Government will need that paper for its first witness.

THE COURT: All right. Before it is in any way furnished to the jury, it will be retyped. You may use it.

MR. WEINGARD: May we have the original pages of the alleged confession marked as a Court's exhibit and preserved for the record?

THE COURT: It will be marked as a Government exhibit for identification. I believe that has already been done.

Get the jury.

(Government Exhibit 11 was marked for identification.)

THE COURT: I have learned from other sources that this is not an unusual form of presentation on the part of those present before me now.

(Jury in box.)

MR. NAFTALIS: Your Honor, before the first witness testifies, the Government would like to put in the record Government's Exhibits 7 and 8, admitted by this Court this morning, as evidence.

Your Honor, may I read them to the jury, briefly?

THE COURT: They are received subject to the defendants' objection.

MR. WEINGARD: Yes. May I state the grounds for those objections?

THE COURT: No. We have already had them, and if there are any further statements, they will be made at the luncheon recess and be included in this case.

(Mr. Naftalis read to the jury from Government Exhibits 7 and 8 in evidence.)

MR. NAFTALIS: Your Honor, the Government is ready to proceed with its next witness.

MR. WEINGARD: Your Honor, before the witness takes the stand, may I have a limiting instruction with respect to the defendant Warme in the exhibits just received?

THE COURT: Yes. These documents are offered as proof of alleged motive, opportunity, intent, plan, knowledge or absence of mistake on the part of the defendant Heimerle. You will later be told that guilt of crime is personal and the proof in a case of a defendant's acts is personal to his acts.

You will also have explained to you that the charge of conspiracy calls for a combination ofscheme of persons, but the acts such as those that are now offered to you are offered as alleged similar acts of the defendant Heimerle alone.

MR. NAFTALIS: Thank you, your Honor.

MR. WEINGARD: Thank you, sir.

the document.

Q. Did he sign the document in your presence?

A. Yes, sir; he did.

Q. Was there anyone else present when he signed the document?

A. Yes, sir; there was.

Q. Special Agent Vezeris, is there a title on that document?

A. Yes, sir. The document is entitled "Warning and Consent". Warning of rights and the waiver of these rights is contained in the lower part of the form.

Q. Special Agent Vezeris, will you please read the rights as listed on that form?

MR. WEINGARD: Is that in evidence.

THE COURT: Do you wish to offer that statement?

MR. NAFTALIS: I will offer it in evidence right now, your Honor.

(Government Exhibit 9 for identification was received in evidence.)

MR. WEINGARD: Your Honor, that is over my objection, based on the Fifth Amendment to the Constitution and the Sixth Amendment to the Constitution of the United States.

Q. Agent Vezeris, will you please read that portion of the document?

THE WITNESS: Yes, sir.

THE COURT: In ink?

THE WITNESS: Yes, sir.

Q. Special Agent Vezeris, is there a further portion of that document?

A. Yes. Contained on the lower portion is a portion of the document entitled "Waiver". It says, "I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me, and no pressure or force of any kind has been used against me. I hereby voluntarily and intentionally waive my rights, and I am willing to make a statement and answer questions."

Once more, there is a section for the date, the time and the signature.

Again, Mr. Warme affixed his signature in ink to that waiver.

Q. Were you present when he signed the waiver portion of that document?

A. Yes, sir. On the bottom of the form there is a certification, and it states, "I hereby certify that the foregoing waiver and warning of rights were read by me to the above signatory, and he has affixed his signature in my presence," and I have signed this on the top line.

Q. Did anyone else sign this certification?

given you and Special Agent Hemmer?

MR. WEINGARD: Objection as to leading.

THE COURT: No. It is not leading to ask whether a document is accurate.

Q Did the document accurately reflect the answers to the questions posed by you and Special Agent Hemmer to Mr. Warme?

A Yes, sir; it did.

Q And the document contained solely the answers that he gave you and Special Agent Hemmer?

A Yes; that's correct.

Q Special Agent Vezeris, I ask you to examine Government Exhibit marked Number 10 for identification and ask you if you can identify that document.

A Yes, sir; I can.

Q Will you please state to the Court and jury what that document is?

A This is a copy of the statemene that was dictated to the secretary, outlining the interview that we had, the questions and answers that we had with Mr. Warme.

Q And this represents the answers given you and Special --

MR. WEINGARD: Objection to leading, Judge.

Q What does it represent?

THE COURT: The question is, what does it represent?

A It represents again an affidavit outlining the warning of rights.

MR. WEINGARD: Objection as a characterization of the affidavit.

THE COURT: It represents a transcript, doesn't it, of something?

THE WITNESS: Yes, sir.

THE COURT: Go on.

THE WITNESS: A transcript of the questioning and answering that was taken part in by Mr. Warme. It is an outline of the statement.

MR. NAFTALIS: Your Honor, the Government offers Exhibit 10 for identification.

MR. WEINGARD: Of course, this is over my objection on the grounds of both the Fifth and Sixth Amendment violations pursuant to the Constitution of the United States.

THE COURT: This document will be received provisionally at this time.

(Government Exhibit 10 for identification was received in evidence.)

MR. NAFTALIS: Your Honor, may the Government now read to the jury the exhibit in redacted form?

THE COURT: Yes.

(Mr. Naftalis read to the jury from Government Exhibit 10 in evidence.)

MR. WEINGARD: Your Honor, I object to the characterization of the paper as an affidavit.

THE COURT: Is the word on there?

MR. NAFTALIS: Yes, your Honor.

THE COURT: Go ahead.

(Mr. Naftalis continued reading to the jury from Government Exhibit 10 in evidence.)

MR. NAFTALIS: Ladies and gentlemen, as you will see, that is the printed upper part of this document.

(Mr. Naftalis continued reading to the jury from Government Exhibit 10 in evidence.)

Q Special Agent Vezeris, did Mr. Warme give those answers to you and Special Agent Hemmer on March 1, 1976?

A Yes, sir; he did.

Q After the statement was typed, did you present it to Mr. Warme for signature?

A Yes, sir; I believe I did.

Q And what if anything did you say to him at that time?

A He stated that he did not want to sign the statement.

Q Did he further indicate to you any reason he had

MR. WEINGARD: Your Honor, I will join in co-counsel's motions and will further state that it strikes me, based on the testimony that I have heard in this case, that we may be in a variance between pleading and proof situation. a multiple conspiracy situation, as it affects the first count.

Now, while I am cognizant of cases like Bertolotti and Meyer, while seem at the appellate level to deal with an issue of prejudice to the individual defendant, certainly at trial stage, there is such evidence of multiple conspiracies, and there is a variance between pleading and proof, and the trial Judge has the right to take action to dismiss the count.

I would think that that is appropriate here. I would ask for a dismissal of the first count on that ground.

THE COURT: I think that there is nothing to the notion that there is a multiple conspiracy here. The proof has been very straightforward, dealing with the arrangements between these two defendants, who used known criminals to market bogus money, and that is what this charge is here, and it is perfectly straightforward, and the injection of the notion of multiple conspiracies is just absurd.

The thing that bothers me is whether Counts 2 and 4 really allege the same offenses or more instances of the same

A. Correct.

Q. And you were conducting the primary part of the interrogation. Were you primarily asking questions?

A. No.

Q. Was Agent Vezeris asking questions primarily?

A. We were both asking questions.

Q. Did you have a case file at that time?

A. Not on -- we had a case file, yes.

Q. Did you have it with you at that time?

A. I had the case file, yes.

Q. Do you recall whether or not during the course of your questioning my client you ever mentioned to him the fact that you had statements from various other alleged co-conspirators in connection with this case?

A. Yes.

Q. You did tell him that, did you?

A. Yes.

Q. And you told him, did you not, that they had all made statements involving him in connection with this supposed counterfeiting; is that correct?

MR. NAFTALIS: Objection as to form, your Honor.

THE COURT: No. I will let him answer the question. It's quicker that way.

Q. (Continuing) Is that what you said?

A. Yes.

Q. Did you have a statement from Bernard Horowitz?

A. A written statement?

Q. A written statement, yes.

A. With me?

Q. No. I will ask you again:

Did you obtain a written statement from Bernard Horowitz?

A. No; I did not.

Q. So when you told my client that you had a statement from Bernard Horowitz involving my client, was that factual or was it not factual?

A. That was factual.

Q. Did you ever obtain a waiver of rights form from Bernard Horowitz?

A. No; I did not.

Q. Did Bernard Horowitz ever sign any sort of a written statement or written document in your presence?

A. No.

Q. Or in the presence of any of the other agents, in connection with this case?

A. I don't recall.

Q. What about Mr. Glock? Did you conduct any interrogation of Mr. Glock?

A. Correct: I did.

Q. Did you obtain a written statement from Mr. Glock?

A. No; I did not.

Q. Did you obtain a signed waiver and consent form from Mr. Glock?

A. No; I did not.

Q. What about Mr. Peters? Did you interrogate Mr. Peters?

A. Yes; I did.

Q. Did you obtain a written statement from Mr. Peters?

A. No; I did not.

Q. Did you obtain a written consent form from Mr. Peters?

A. No; I did not.

Q. Now, when Mr. Oliveri was initially arrested, Mr. Oliveri the elder, Angelo Oliveri, did you conduct the interrogation of Angelo Oliveri?

A. No; I did not.

Q. Were you present at that interrogation?

A. No; I was not.

Q. Do you know anything about that interrogation of Angelo Oliveri?

A. No.

Q. Do you know whether or not there was in the case

file a waiver of rights and consent form from Mr. Oliveri?

A. No; I do not.

Q. Do you know whether or not Mr. Oliveri signed such a statement?

A. No; I do not.

Q. You do know as a result of Mr. Oliveri's discussion of the case with other members of your office that Agent Vezeris and Oliveri went to meet with Warme: is that what you know?

A. Yes.

Q. Do you know whether or not there were any other transcriptions of that conversation?

A. No; I do not.

Q. Tape recorded conversations?

A. No; I do not.

Q. You also know that Mr. Warme on that occasion did not sell any counterfeit; correct?

A. Correct.

Q. He did not confess; correct?

A. Correct.

Q. Now, when Mr. Warme was brought into your office in the World Trade Center Building, he was taken upstairs and put in a room; correct?

A. Correct.

Q Before being put in a room, he emptied his pockets; correct?

A I don't recall.

Q Isn't it your procedure before interrogating a witness and after having patted him down to have him empty his pockets when he gets to your office?

A That's the procedure, yes.

Q And you followed procedure, I assume?

A Not in every instance, no.

Q Do you remember whether or not you had him empty his pockets on that day?

A To the best of my knowledge, I believe we did.

Q And do you remember whether or not you took an address book and certain other items, currency, whatever, from him at that time?

A I don't recall at this time.

Q But some stuff was taken from his possession at that time?

A Yes.

Q He didn't have any counterfeit on him, did he?

A No.

Q I am sorry; I didn't hear that.

A No.

Q He didn't have any contraband on him at that time,

did he?

A. No.

Q. And when you took those items, I assume you made an inventory of what it was that you took from his possession; is that a fair statement?

A. I did not.

Q. Do you know who did?

A. No; I do not.

Q. Do you know if anyone did?

A. I don't remember.

Q. Did there come a time when these items were returned to Mr. Warme?

A. Yes.

Q. And when they were returned, did you obtain a receipt from Mr. Warme indicating that you had returned the various items?

A. No.

Q. Are you positive of that?

A. I did not.

Q. And you know of no one who did?

A. No; I do not.

Q. But it is the procedure in your office to obtain such receipts after items have been taken away from somebody and then are returned; is that correct?

A. If they are taken over a period of time, yes.

Q. What if they are taken to be looked, inspected and photocopied and inventoried: don't you then obtain a receipt if there are valuables returned?

A. Not necessarily, no.

Q. But that is done, is it not?

A. Occasionally.

Q. And in order to obtain a receipt, you supply a piece of paper to the individual and ask him to sign it, don't you?

A. At times, yes.

Q. And if the person won't sign the receipt, you won't give him back his property, if it is important property, would you?

A. I can't say yes, and I can't say no.

Q. Now, there came a point, did there not, when you were present in the interrogation room, yourself, my client and Vezeris and a stenographer; is that correct?

A. Correct.

Q. Do you remember --

THE COURT: You don't mean your client at that time.

MR. WEINGARD: No, not at that time, sir.

THE COURT: Well, you are not making it clear. You

don't claim to be the lawyer who represented him?

MR. WEINGARD: No, sir; I do not. I make no such claim.

Q There came a time when yourself, Vezeris and Mr. Warme, as well as a stenographer, were present in the room; is that so?

A That's correct.

Q And you were there all the time?

A No; I was not.

Q Were you there all the time that the stenographer was there?

A No; I was not.

Q Did you dictate anything to the stenographer?

A No; I did not.

Q Did Vezeris dictate anything to the stenographer?

A No; he did not.

Q Do you recall testifying on a preliminary hearing last week, here?

A Yes; I do.

Q Do you recall testifying that Vezeris dictated a statement to the stenographer at that time?

A I think I am having problems with the word "dictate".

Q Well, do you recall testifying that Vezeris

dictated the statement to the stenographer at that time?

MR. NAFTALIS: Your Honor, may we have reference to the prior statement that Mr. Weingard is referring to?

THE COURT: Sustained.

Q Do you recall ever having made the statement that Vezeris dictated --

MR. NAFTALIS: Your Honor, I object. There is no evidence --

THE COURT: I will let him ask that general question.

A I don't recall my exact words, no.

Q When you walked into the room, did you see Vezeris talking to the stenographer?

A I don't recall.

Q Did you see Vezeris telling the stenographer what to write down?

A I saw him speaking to her, yes.

Q And was she writing when he was speaking to her?

A I believe she put steno notes down before she typed the statements, yes.

Q And that was based on what Mr. Vezeris told her; is that correct?

A No.

Q Did you see my client dictate a statement to the

stenographer?

A. No.

MR. WEINGARD: No further questions.

MR. NAFTALIS: No cross, your Honor.

THE COURT: Thank you very much. You may step down.

(Witness excused.)

MR. WEINGARD: Defendant Warme rests, sir.

THE COURT: Any rebuttal?

MR. NAFTALIS: No rebuttal, your Honor.

THE COURT: Both sides rest.

I take it that the applications are renewed?

MR. POLLACK: Yes, sir.

MR. WEINGARD: Yes.

THE COURT: And the same rulings.

MR. WEINGARD: Yes, your Honor.

THE COURT: All right.

You may proceed with your summation, Mr. Naftalis.

MR. NAFTALIS: If I may have just a moment, please.

THE COURT: Just a minute, before you proceed.

(Pause.)

MR. POLLACK: Your Honor, may I send a note to the Court?

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We know from the testimony that Corbo got his counterfeit from Oliveri and Oliveri got his counterfeit from Warme. And what else do we know about the counterfeit from the witnesses? They wrapped them up in bank bands. In what denominations did Peters tell us? Thousand-dollar denominations. Exhibit 5 in evidence is the counterfeit with thousand-dollar denominations. All of the witnesses testified about the counterfeit being shown with the bank bands around them, and Mr. Peters wrapped them in thousand-dollar denominations. That counterfeit is in evidence.

And speaking about the counterfeit, let's not forget about some of the other counterfeit, the yellow stuff that Peters gave to Warme to pass in Gimbels -- that Peters gave to Horowitz to pass in Gimbels. If there is any question about it, examine it. It's in evidence.

Now, ladies and gentlemen, the Government has offered us other evidence during the course of this trial, evidence which I submit to you you should consider. First of all, Mr. Heimerle sits here on trial of an indictment that charges him with the sale of counterfeit on three separate occasions and conspiracy to do this.

What do we know about Mr. Heimerle, other than the instances that were testified to here about his participation in the scheme? We have in evidence two prior convictions of

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Mr. Heimerle, both within he last three years. For what? Dealing in counterfeit money. He was convicted on June 18, 1973, in this court house, for conspiracy to distribute and pass counterfeit and the actual sale of counterfeit currency. And what does the indictment tell us? Fifty- and one-hundred-dollar Federal Reserve notes, two of the same denominations as in the instant case.

What else do we have in evidence? That this very June, June 15th of this year, Mr. Heimerle was also convicted of three counts of selling hundred-dollar Federal Reserve notes, and he was convicted of a conspiracy to be involved in that.

Consider that, ladies and gentlemen of the jury. Consider that about Mr. Heimerle, the kind of business enterprise that he establishes. I submit to you, ladies and gentlemen, that we have evidence here before us that he has structured once again or participated once again in the illegal business enterprise aimed at the sale of counterfeits like he was convicted of twice before.

What else do we have in evidence?

We have in evidence a confession from Richard Warme, Richard Warme, this defendant on trial, admitted into evidence here, a confession he gave agents of the Secret Service.

prosecutions.

These rights are read to him, and then they are given to him to read, himself. He admits in writing here, ladies and gentlemen, that he received his rights. What does it say? It says, "I have received these rights. I do not want a lawyer at this time. I understand and know what Iam doing. No promises or threats have been made to me, and no pressure or force has been used against me. I hereby voluntarily and intentionally waive my rights, and I am willing to make a statement and answer questions."

It is signed "Richard Warme", right here.

It is in evidence. If you have any question about it, take a look at it.

What does Warme do? Warme proceeds to be interviewed by agents of the Secret Service with respect to the investigation. And what does he tell? He talls basically, ladies and gentlemen, the same story you heard here during the course of the trial. He doesn't go into all the detail. He fails to tell about sending Bernie Horowitz out to Las Vegas. He tells us a lot of other things. He tells us about Peters, Oliveri, the yellow hundred-dollar bills, the new stuff that they were dealing in. He tells us about Fred Glock. He tells us about everybody, right there, in his own words.

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MR. POLLACK: Objection, your Honor.

THE COURT: Please proceed.

MR. NAFTALIS: Thank you, your Honor.

And that confession is in evidence.

Now, ladies and gentlemen, we have heard other evidence during the course of this trial about the transportation of this counterfeit beyond the realm of the City of New York, beyond the realm of the State of New York. There was an attempt on the part of the defendants and their co-conspirators to move this counterfeit outside to place it in Las Vegas. We have heard evidence about that. We have heard evidence about how Warme and Peters showed up with the counterfeit that they had obtained from Heimerle.

They go to Warme's apartment. They treat it there. They get an iron and some stain and dip it in the stain and iron it, trying to make the bills look better, and they put them in the bands, part of Exhibit 5 in evidence. They bind them up in Bernie Horowitz's apartment and pack them in the little blue bag, and Warme and Peters and Horowitz go in the car to the airport.

First, they try to get the ticket across the street, and the check was given by Warme to Horowitz for the ticket, and it bounces. The travel agent won't accept it. They go to the airport with another check, and TWA makes

o'clock.

Now, one other matter:

Mr. Weingard, you asked me to include in the charge a reference to a Government informant. We had no Government informant.

MR. WEINGARD: Judge, apparently there came a point when Angelo Oliveri became a Government informer and went along with an agent to introduce him to my client or set him up.

THE COURT: That is not the type of person who is regarded as an informer for an informer charge. He is no more than one of the co-conspirators, and I believe it was so indicated in the discussion.

Let me turn to your other items.

MR. WEINGARD: Yes, sir. May I get my copy?

MR. NAFTALIS: Your Honor, if I may, I will pass up to the clerk Government Exhibit 10 in evidence, so that your Honor's secretary may retype the second page, in case the jury wishes to see it.

MR. WEINGARD: Wich request are you directing your attention to now, sir?

THE COURT: I take it you want me to give a charge on the failure of the defendants to testify. Is that also the request of the defendant Heimerle?

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guilt to the agents of the Secret Service and admits dealing with Glock and Oliveri and Misseri and all the rest of them. It's not going to vanish.

Your Honor, I'm just about coming to a conclusion.

Ladies and gentlemen, I believe -- I am sorry. I withdraw that. I submit to you --

MR. WEINGARD: Your Honor, with all due respect, the remark of counsel just now requires an application for the withdrawal of a juror.

THE COURT: I don't understand that. The application is denied. He started to say something. He did not continue with the statement. You heard him say that he withdrew the statement he started to make, and there was no occasion for your interrupting the balance of this rebuttal.

MR. NAFTALIS: Thank you, your Honor.

THE COURT: The jury will understand that it is not the beliefs of any of the lawyers that counts, whether they are for the Government or the defendants. It is your understanding of what the facts are that will guide you in this case.

MR. NAFTALIS: Thank you, your Honor.

I ask you to use your common sense. Think about Horowitz and Peters, think about that confession and the other corroborating evidence given by all the various

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UNITED STATES OF AMERICA

vs 76 Cr 442

JAMES HEIMERLE and
RICHARD WARME

New York, N. Y.

September 30, 1976

CHARGE OF THE COURT

THE COURT: (Pollack, D. J.) Ladies and gentlemen of the jury:

I will now instruct you on the legal principles on the basis of which you will consider the case that you have heard.

A verdict in a criminal case of not guilty or guilty must be unanimous as to each defendant and each count on which you are reporting, and it must represent each juror's individual, honest judgment on the facts in evidence.

The indictment in this case charges that the defendants, James Heimerle and Richard Warme, have each committed four separate crimes. It charges that each has violated a law having to do with the counterfeiting of Federal Reserve notes and that each has violated this law on three separate occasions in three separate matters.

The second count of the indictment charges offenses

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in connection with the so-called yellowed $100 notes in December 1975. The third count in the indictment refers to the $50 and $20 counterfeit notes in January 1976. The fourth count of the indictment refers to the so-called improved batch of $100 notes in December 1975.

The indictment also charges each of these defendants with the crime of conspiracy as a member of two or more plotters to violate the laws against counterfeiting. That is charged in Count 1. You will have a copy of the indictment to take with you into the jury room.

An indictment is an accusation designed to bring the one accused to court. It is not the function of a grand jury which indicts to determine guilt or innocence. It passes only on probable cause to believe defendant to be implicated. The trial jury, that is, yourselves alone, are to decide whether the defendant is guilty or not guilty. You are, therefore, to give no weight to the fact of the indictment.

It is your exclusive function to determine what the facts are in this case on the basis of your consideration of the evidence. It is your duty to accept my instructions as to the law applicable to this case. You will apply my instructions, the guidelines, to the facts as you find them to be, and you will decide whether or not the defendant you are considering is guilty or not guilty of the charges against

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him.

Your recollection of the evidence will control here, not the recollection of the lawyers and not even my recollection. You will decide the weight that will be given to the evidence, the credibility that you will extent to the witnesses who testify and the reasonable inferences that are to be drawn from the evidence that has been received. You are not to draw any inference as to guilt or innocence of the defendants on trial or as to the credibility of any witness from any rulings or comments, if I made any, during the trial. I express no views.

The defendants pleaded not guilty to the indictment, and that means that the Government has the burden of proving guilt beyond a reasonable doubt with respect to each defendant and each element of the crime that each defendant is accused of having committed. I will tell you what those elements are in a few moments.

Under our law, no defendant is obligated to prove his innocence. He does not have to submit any evidence on the subject of his innocence or any evidence at all if he does not want to. A defendant under the American system is presumed to be innocent, and that presumption continues throughout the trial and right through your deliberations. It is only overcome when you have determined, on the basis

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of your resolution of the facts from the evidence, that guilt was established on each element of the crimes charged.

Reasonable doubt is a legal phrase. It means a doubt which is sufficient to cause a prudent person to hesitate in a matter of importance to himself or herself. If the evidence which you believe is such that a prudent person would act thereon without hesitation in a matter of importance to himself or herself, then you may say you have been convinced beyond a reasonable doubt.

A reasonable doubt is not just any kind of a doubt or a speculative doubt; it is not a fanciful idea; it is not a guess. A doubt suggested by the ingenuity of counsel or even by your own ingenuity not legitimately warranted by the evidence or the want of it is not what is meant by a reasonable doubt.

If your mind, on the other hand, is wavering or is uncertain to the point where you have a doubt that would cause a prudent person to hsitate in a matter of importance to him or her based on the evidence or the want of it in the case, then you have not been convinced beyond a reasonable doubt.

The Government contends that its evidence has established the defendants' guilt on each charge beyond a reasonable doubt. Each defendant contends that no evidence has overcome the presumption of his innocence and that at

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least there is a reasonable doubt as to his guilt.

You will apply to all the evidence the same standard of proof. The Government must satisfy you beyond a reasonable doubt of the guilt of the defendant you are considering or else you must acquit him on the charge you are considering.

You will make your own evaluation of the evidence, including the testimony given by each of the witnesses, and determine the credibility which you choose to give to such evidence.

In weighing the testimony of the witnesses, you can consider their relationship to the Government or to the defendant, if any, as the case may be, and you may consider any bias or interest in the outcome of the case that they may have; the witness' manner while he was testifying, that is, the witness' candor, intelligence, whether the witness equivocated or whether the witness was frank and straightforward, and the extent to which the witness has been corroborated or contradicted by other credible evidence or circumstances or inconsistencies or reasonable inferences to be drawn from the testimony.

If you believe a witness has wilfully testified falsely before you, you are privileged to disregard his or her testimony, but you do not have to. A person may be lying

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about part of what he says and may be telling the truth about other parts. He may be mistaken about parts and be accurate as to other parts. It is for you to decide, after you have scrutinized the evidence and weighed the demeanor of the witness. The demeanor, of course, means how the witness looked to you on the witness stand.

The defendants did not testify on their own behalf, and our law says that a defendant may or may not take the stand; but that fact -- the fact that a defendant did not testify -- cannot be considered by you as any evidence against him or form a basis for any presumption or inference unfavorable to him. You must not allow that fact to weigh, in the slightest degree, against a defendant, nor should it enter into your deliberations.

The law recognizes two types of evidence, direct and circumstantial, either of which may be sufficient to convict, providing the jury upon all the evidence is satisfied beyond a reasonable doubt.

Direct evidence, of course, comes from a witness present at a conversation or the commission of an act and he testifies to what he saw or what he heard or discovered, what he knows of his own knowledge, something which comes to him by virtue of the senses of sight or sound or smell or touch. That is evidence which is direct evidence.

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Circumstantial evidence is, as I think most of you know, evidence that tends to prove a disputed fact by proof of other facts as evidence which has a logical tendency to lead one's mind along the road to conclude that a fact in issue actually exists. Circumstantial evidence is not to be given any less weight because it is circumstantial rather than direct.

There is a simple illustration of circumstantial evidence, which sometimes clears it up for the jury:

Suppose when you came into court this morning there were no clouds in the sky as yet, and when you came into the trial court, suppose all the shades were drawn and the blinds were down so that you couldn't see outside. But along in the morning or the afternoon somebody came walking into the courtroom with a dripping umbrella and a dripping raincoat.

You hadn't been outside since you came into the courthouse, and when you left the outside it was clear; but when these people came in with their dripping umbrellas and raincoats, you would infer that something may have happened. You would be entitled to infer from the circumstance that there is a dripping umbrella and a raincoat that it is raining outside, even though you did not see the rain yourself.

Thus, circumstantially, you infer from a fact, the

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dripping raincoat and umbrella, some other fact: that it is raining outside.

That is what circumstantial evidence is.

The indictment in this case named four defendants. Only two, James Heimerle and Richard Warme, are now on trial before you in this case. They are the only persons whom you will find to be guilty or not guilty in your verdict, although, as I will explain to you shortly, in considering whether each is guilty or not guilty, you may have to determine the nature of the participation of the other persons named in the indictment in this case.

In determining whether a defendant is guilty or not guilty, you must bear in mind that guilt is personal. Whether a defendant on trial before you is guilty or not guilty must be determined separately with respect to him solely on the evidence presented against him, or the lack of evidence. The case of a defendant stands or falls on the proof or lack of proof against him and not against somebody else.

The fact that other persons named in the indictment pleaded guilty to the alleged conspiracy charged in this case is not to be taken as evidence of the guilt of the defendants on trial or that the crimes charged against them were committed, nor may any adverse inference be drawn against the defendants, Warme and Heimerle, by reason thereof, and that

follows because guilt is personal.

The guilt of these defendants on trial must be proved by evidence.

The witnesses Oliveri, Miressi, Glock, Horowitz and Peters who came before you, if you believe their testimony, were alleged accomplices of the defendants on trial. They admitted their prior records with the law, and the Government contends that one or more -- you will recall which -- testified that he or they were known as criminals to the defendants and were therefore selected to aid in carrying out the alleged counterfeiting transactions.

An accomplice does not become incompetent as a witness because of his alleged participation in criminal acts charged. On the contrary, if the only evidence on some or all of the essential elements of any count is the testimony of an accomplice, it may still be of sufficient weight, if you believe it, even though it is not corroborated to sustain a verdict of guilty against the defendant on trial.

You will be the judges of the facts based on all the evidence, the inferences and the reasonable probabilities.

Again, I caution you that you must bear in mind that the testimony of an alleged accomplice should be closely examined and weighed with caution and great care.

The Government has introduced certain oral state-

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ments attributed to Richard Warme, allegedly made to agents of the secret service and allegedly taken down thereafter by a stenographer, about his involvement in the sale of counterfeit bills. It has been suggested that the self-incriminating oral statements were not voluntary or even made by Warme.

You have heard the evidence. You are to give such weight to the alleged confession as you feel it deserves under all the circumstances that have been put before you in the evidence. You may, if you wish, consider any or all of those statements as admissions by Mr. Warme which tend to establish any or all of the elements of any of the counts against him.

Admissions of a defendant are among the most effectual proofs in the law and constitute the strongest evidence against the party making them that can be given of the facts stated in the admissions. Accordingly, you are entitled to give great weight to such admissions as you find to exist in this case that you believe to have been voluntarily given.

The oral statement or confession of Warme called to your attention is the alleged oral statement of Warme and is not to be considered as against the defendant Heimerle.

Evidence of prior criminal convictions has been admitted into evidence during this trial showing by judgments certain convictions of the defendant Heimerle. This evidence

was admitted and is to be considered only for a limited purpose: to aid the jury in determining his motive and intent, if any, and it should not be used by you for any other purpose.

The judgments of Heimerle's convictions on his alleged acts are not to be considered in any light other than as alleged evidence to show his alleged intent and motive as bearing on his acts, if any have been proved to your satisfaction. They are not to be considered for any other purpose, nor are they to be considered against the co-defendant, Warme.

The first count, or criminal charge, in this indictment charges the defendants on trial and others with a criminal conspiracy or agreement. Conspiracy is itself a Federal offense, different and separate from the offense of violating the substantive law, the underlying law.

A conspiracy is a scheme to do something illegal. A substantive offense refers to what has been done, the doing of it and not the mere scheming of it. One has to do with plotting, and the other has to do with carrying it out.

A conspiracy or plot or scheme is sometimes referred to as a partnership in crime, since it takes two or more persons to scheme in the conspiracy.

Concerted action for criminal purposes generally

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makes it possible to accomplish more important and more complex results than those which an individual, acting alone, could accomplish. Group association also increases the likelihood that the criminal venture will be successful. At the same time, group association renders detection more difficult than when one individual is acting alone.

For these and other reasons, Congress enacted a provision of the law which in relevant part is as follows:

"If two or more persons conspire . . . to commit any offense against the United States or defraud the United States or any agency thereof in any manner or for any purpose, and one or more such persons does any act to effect the object of the conspiracy, each shall be guilty of a criminal offense."

This is the conspiracy law which the defendants on trial are charged with violating, in Count 1 of the indictment.

From my reading of the conspiracy law you have heard that for a violation of the law there must not only be a conspiracy, a plot, but there must also be at least one act by one of the co-conspirators -- any one of the co-conspirators, not necessarily a defendant on trial -- to effect the object of the conspiracy. This required act is usually called an overt act, one that can be seen.

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A conspiracy, or a concerted act to violate Federal law, is thus a crime entirely separate, distinct and apart from the substantive violation of law or crime, the violation of which may be the object of the conspiracy.

In order to make a finding that the defendant whom you are considering is guilty, the Government must prove each of the following elements beyond a reasonable doubt:

First, that some time between November 1, 1975 and February 29, 1976, in the Southern District of New York and elsewhere, there existed a conspiracy to commit the offenses charged in the indictment as objects of the conspiracy. Those offenses are the purchase or sale or transfer or receipt or delivery of fal e, forged, counterfeited and altered obligations and other securities of the United States, in this case twenty-dollar, fifty-dollar and hundred-dollar Federal Reserve notes, with the intent that the same be passed, published and used as genuine.

The Government must prove that the defendant entered into an agreement with at least one other person to commit at least one of those offenses. As I say, you can't conspire with yourself. You have to conspire with at least one other person.

Second, the second element that has to be proved by

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the Government is the specific intent of the defendant under consideration to violate the substantive statute and to knowingly and wilfully become a participant in the conspiracy.

Third: the third element is that one of the co-conspirators knowingly committed in the Southern District of New York at least one of the overt acts set forth in the first count of the indictment at or about the time and place alleged.

I will read those overt acts to you in a few moments.

Going back, let us consider the first element.

What is conspiracy? A conspiracy is a combination or agreement of two or more persons by concerted action to accomplish a criminal or unlawful purpose or to accomplish a lawful purpose by criminal means. A conspiracy has sometimes been called a partnership in crime, in which each member becomes the agent of every other member.

To establish a conspiracy the Government is not required to show that two or more persons sat around a table and entered into a solemn compact, oroally or in writing, stating that they have formed a conspiracy to violate the law, setting forth the detailf of the plan, the means by which the unlawful project will be carried out or the part to be

played by each conspirator. Indeed, it would be most extraordinary if there were such a formal or specific oral agreement in the case of conspiracy for criminal purposes.

Your common sense will tell you that when men in fact undertake to enter into a criminal conspiracy, much is left to unexpressed understanding. From its very nature, a conspiracy is almost invariably secret in its origin and in its execution. It is sufficient if two or more persons, in any manner, through any contrivance, impliedly or tacitly, came to an understanding in common to violate the law. Express language or specific words are not required to indicate assent or attachment to a conspiracy.

In determining whether there has been an unlawful agreement, you may judge the acts and conduct of the alleged members of the conspiracy, whether named as defendants or only as co-conspirators, which are done to carry out an apparent criminal purpose. Usually, the only evidence available is that of disconnected acts on the part of the alleged individual conspirators, which acts, however, if taken together in connection with each other show a pattern of conspiracy or agreement to secure a particular result as satisfactorily and as conclusively as more direct proof.

If, for example, several persons gathered together, and shortly thereafter there was some concerted action among

them, with each of them doing something to relate it with the acts of the others, all of which contributed in the same or similar manner towards the accomplishment of the same unlawful objective, such evidence would support the inference that those persons had conspired together to accomplish that purpose.

So you must first determine from all the evidence in the case whether or not a conspiracy as charged in the first count of the indictment existed. You are not to judge the character and effect of the alleged conspiracy by dismembering it and viewing its separate parts, but only by looking at it as a whole.

It is sufficient if from proof of all of the relevant facts and circumstances you find beyond a reasonable doubt that the minds or at least two alleged co-conspirators met in an understanding way so as to bring about a deliberate agreement to do the acts as charged in the first count of this indictment.

If you conclude that a conspiracy as charged in the first count did exist, you must next determine whether the defendant on trial whom you are then considering was a member, that is, whether he knowingly and wilfully and unlawfully associated himself with the conspiracy and participated therein with the specific intent to violate the substantive

law here involved.

In making that determination, you should examine and consider all the evidence in the case.

The words "knowingly, wilfully and unlawfully" mean that you must be satisfied beyond a reasonable doubt that the defendant you are considering knew what he was doing, that he did it deliberately and voluntarily, as opposed to mistakenly or accidentally or as a result of some coercion, and that he acted with the specific intention to violate the law.

Of course, it is not necessary that a defendant know that he was breaking any particular law. However, it is sufficient if you are convinced beyond a reasonable doubt that he was aware of the general unlawful nature of his acts or alleged participation or aiding and abetting of others in those acts, if he did.

Knowledge and intent exist in the mind. Since it is not possible to look into a man's mind or a woman's mind to see what went on, the only way you have for arriving at a decision on these questions is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question. Direct proof is

not necessary. Knowledge and intent may be inferred from all the surrounding circumstances. They may be proved circumstantially.

The mere association of a defendant with an alleged conspirator or even mere presence at the scene of a crime or mere knowledge of the conspiracy without more do not alone establish his participation in the conspiracy, if you find that one in fact existed. In determining whether the defendant you are considering was a member of the conspiracy, you are to consider whether in some sense he participated in or promoted the venture himself, made it his own or had a stake in its outcome.

The guilt of a conspirator is not governed by the extent or duration of his participation, or whether he had knowledge of all of its operations, nor is it necessary that he know all the members of the conspiracy. Some conspirators may play major roles while others may play minor roles.

Even if one conspirator joined the conspiracy after it was formed and was engaged in it to a degree more limited than that of other co-conspirators, he is equally culpable, so long as he was a co-conspirator.

In a word, it is not required that a person be a member of a conspiracy from its start. He may join it at any point during its progress, and, using the partnership

analogy again, by joining it at any point he becomes liable for all the acts of the partnership.

Thus, the acts and declarations of any person who is found by you to have been a member of the conspiracy made during its pendency and in furtherance of its objectives are considered the acts and declarations of all other members, whether or not they were present, and any act, statement or declaration of one partner in furtherance of the partnership's purposes becomes the act or statement of all the other partners, even though they were not present.

It has been contended here that the Government has failed to prove the existence of only one alleged conspiracy but has proved several separate and independent alleged conspiracies, that is, multiple conspiracies, involving various of the defendants.

Should you find that the Government has failed to prove, beyond a reasonable doubt, the existence of only one conspiracy, as charged in Count 1 of the indictment, you must find the defendants not guilty. Proof of several separate conspiracies does not satisfy the requirements unless there is proof of the conspiracy charged in the indictment.

If you find that a particular defendant is a member of another conspiracy and not the one charged in the indict-

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ment, then you must acquit that defendant. In other words, to find a defendant guilty, you must find that he was a member of the conspiracy charged in the indictment and not some other conspiracy.

I will put it another way:

Proof of several conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges. What you must do is determine whether the conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit. However, if you are satisfied that such a conspiracy existed, you must determine who were the members of that conspiracy; and to find a defendant guilty you must find that he was a member of the conspiracy charged in the indictment and not some other conspiracy.

A single act by a defendant may be the basis for drawing an actor within the ambit of an alleged conspiracy, but since conviction of conspiracy requires an intent to participate in the unlawful enterprise, the single act must be such that one may reasonably infer from it such an intent.

Proof of participation in a single, isolated counterfeit money transaction standing alone is insufficient

to warrant convictionof conspiracy when there is no independent evidence tending to prove that the defendant had some knowledge of the broader conspiracy and an intention to participate therein, that is, when the single transaction is not in itself one from which such knowledge and intent may be inferred.

You remember that I told you that a further essential element of the crime of conspiracy is that an overt act to effect the object of the conspiracy be committed by at least one of the co-conspirators -- it doesn't matter which one -- after the unlawful agreement had been made.

An overt act is any step, action or conduct which is taken to achieve, accomplish or further the object of the conspiracy.

The purpose of the law in requiring proof of an overt act is that while parties might conspire and agree to do an unlawful thing, yet they may change their minds and do nothing to carry it into effect, in which event it will not constitute an offense. The crime of conspiracy is not thought control.

The overt act need be neither a criminal act nor the very crime which is the object of the conspiracy.

You must find beyond a reasonable doubt that at least one of the following overt acts, as charged in the

indictment took place.

The indictment says:

"In furtherance of said conspiracy and to effect the objects thereof, the defendants and their co-conspirators committed and caused to be committed the following overt acts, among others, in the Southern District of New York and elsewhere -- and by the way, Irvington, Dobbs Ferry and New York City are all in the Southern District of New York, as is the Bronx.

(a) In November 1975, the defendants James F. Heimerle and Joseph Peters met.

(b) In or about December 1975, the defendants Richard Varme, Joseph Peters and Bernard Horowitz drove to Kennedy Airport, Queens, New York City.

(c) On or about December 10, 1975, the defendant Richard Warme gave defendant Bernard Horowitz a counterfeit $100 Federal Reserve note.

(d) In or about December 1975, the defendant Bernard Horowitz traveled to Las Vegas, Nevada, from Queens, New York.

(e) In or about January 1976, the defendant Richard Warme met with co-conspirator Richard Glock in the Bronx, New York.

(f) Between December 1975 and January 1976 the

defendants Heimerle, Warme, Horowitz and Peters met.

(g) In or about January 1976, the defendant Richard Warme met with co-conspirator Angelo Oliveri in Irvington, New York, and gave him counterfeit Federal Reserve notes.

(h) On or about January 4, 1976, the defendant James Heimerle met with the defendant Richard Warme in Dobbs Ferry, New York.

Those are the overt acts, the separate overt acts recited in the indictment.

Incidentally, it doesn't matter if an overt act is alleged to have occurred on or about a certain date and you find from the testimony, if you do, that it occurred on another data. If you find that it occurred on or about the date specified but within the conspiracy period, that would be sufficient.

Again, I emphasize, the law requires only a substantial similarity between the dates alleged in the indictment and the date mentioned in the testimony, and it requires that only one of the acts be committed by any one of the conspirators during the course of the alleged conspiracy.

Now let us turn to the remaining, the so-called substantive counts.

The defendants in Counts 2, 3 and 4 are charged

with having violated a law known as Section 473 of Title 18 of the United States Code, which provides in pertinent part:

"Whoever sells, exchanges, transfers or delivers any false, forged, counterfeited or altered United States Treasury bills, with the intent that the same be passed, published or used as true and genuine," is guilty of a crime.

I am about to explain to you what facts the law requires you find proven before you may find any person guilty of violating this statute. Before I do so, however, I instruct you that although Counts 2, 3 and 4 all allege violations of the same statute, each count alleges a separate crime, and you must, therefore, consider each count separately from all others. Even though the same law may be involved in the separate counts, the facts differ as to each count. The bogus currency differs in each count, as I have explained it to you before.

Remember, moreover, you must consider the guilt of each defendant separately with respect to each crime charged.

Now, in order for you to find the defendant whom you are then considering guilty of the crimes charged in Counts 2, 3 or 4, you must find the following facts beyond a reasonable doubt:

First, that on or about the particular dates

specified in Counts 2, 3 and 4, that is, for Counts 2 and 4 December 1975 and for Count 3 January 1976, in the Southern District of New York, the defendant you are then considering did one or more of the following: sold, exchanged, transferred or delivered or aided and abetted another or others to do any of those things in respect of the counterfeit Federal Reserve notes specified in Counts 2, 3 and 4.

Second, that at the time, the defendant you are then considering knew the Federal Reserve Notes specified in the particular count were counterfeit.

Third, that in so doing, the defendant acted with the intent that such counterfeit bills be passed, published or used as true or genuine.

I instruct you that a United States Federal Reserve note, of whatever denomination, is an obligation and security of the United States.

"Counterfeit", as applied in this case, means forged or imitated United States Federal Reserve notes. A counterfeit United States Federal Reserve note is a fraudulent and criminal imitation of a United States Federal Reserve note prepared so as to resemble or pass for an actual legitimate United States Federal Reserve note.

The acid test in determining whether the particular notes in question are counterfeit is whether the notes bear

wuch a likeness or resemblance to any genuine United States Federal Reserve note issued under the authority of the United States as are calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care dealing with a person supposed to be upright and honest.

By "transfer," of course, I mean to convey or remove from one place to another or one person to another, to pass or to hand over to another. A transfer need not be hand-to-hand so long as the objects are conveyed and passed from the control of one person to the control of another.

By "delivery," I mean the act by which objects -- in this case, bills -- are placed within the actual or constructive possession or control of another.

In order to convict a defendant on Counts 2, 3 and 4, you must find that he knowingly sold, exchanged, transferred or delivered counterfeit bills involved, that is to say, that he knew that these bills were counterfeit.

As I have told you previously, "knowingly" simply means with knowledge. The defendant knowingly aided and abetted or sold, exchanged, transferred or delivered the counterfeit notes if he knew that they were counterfeit at the time when he sold, exchanged, transferred or delivered them or aided others and abetted others to do so.

"Wilfully and unlawfully" means to do something

deliberately and voluntarily, specifically intending to violate the law, as opposed to mistakenly or accidently or as a result of some coercion.

The Government must prove on these substantive counts that the defendant you are then considering acted with an intent that the counterfeit Federal Reserve notes be passed, published or used as true and genuine, which means that the defendant acted at the times specified in the indictment with knowledge that the bills in question were counterfeit and with a specific unlawful intent, that is, an intent that at some time in the future some one or more members of the public would be given one of these counterfeit bills as payment for something or would be told that these bills were genuine and true or would deal with the bills in some way under the mistaken assumption that they were true and genuine without knowing that they were counterfeit.

It is not necessary that the defendant have any particular persons in mind as the victims or the objects or the persons who would be defrauded or to whom the notes would be passed as true and genuine. Nor is it necessary that the notes have ever been actually passed or used as true and genuine. The Government does not have to prove that the defendant ever actually caused any person to suffer a pecuniary loss from having accepted the notes in the

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mistaken belief that they were genuine.

Nor is it necessary, if you find that the notes were passed, published or used as true and genuine, to find that a defendant did so to find the necessary intent. The possessor of the note need not personally pass, publish or use them as true and genuine. It can be done by an intermediary, innocent or otherwise.

In determining whether or not a defendant had the necessary intent, you are instructed that even if the persons who ultimately received the notes knew the notes were counterfeit, that knowledge is irrelevant to your determination and has no bearing on whether a defendant had the intent necessary to commit a criminal violation of this law.

I have mentioned aiding and abetting. In Counts 2, 3 and 4 the defendants on trial are also charged with aiding and abetting others to commit the crimes charged. This is because it is not necessary for the Government to show that each defendant physically committed the particular crime himself.

Section 2 of Title 18, United States Code, provides that a person who aids and abets another to commit an offense is just as guilty of that offense as if he committed it himself. Accordingly, you may find each defendant guilty of

any or all of the substantive offenses charged if you find beyond a reasonable doubt that some person committed the specific offense and that a particular defendant wilfully and knowingly and unlawfully aided and abetted him with the specific intent to further the object of the other.

To determine whether a defendant aided and abetted the commission of an offense, you ask yourselves these questions:

Did he associate himself with the venture?

Did he participate in it as something he wished to bring about?

Did he seek by his action to make it succeed?

If he did, then he is an aider and abettor.

Now, under your oath as jurors, you cannot allow a consideration of the punishment which may be inflicted upon the defendants, if convicted, to influence your verdict in any way or in any sense enter into your deliberations. You are not to ask yourselves anything about punishment of the defendants. The duty of imposing any sentence in any case rests exclusively upon the Judge, not the jury. Your function is to weigh the evidence in the case before you and to determine the guilt or innocence of the defendant you are considering solely upon the basis of such evidence and the law.

You are to decide the case upon the evidence and

the evidence alone, and you must not be influenced by any assumption, conjecture, sympathy, speculation or fanciful notions or any inference not warranted by the facts unless proven to your satisfaction.

This case, in short, calls for an exercise of your good common sense and judgment on the basis of the actual evidence that you have heard. Do not be confused or misled or sidetracked by matters not in evidence or matters not addressed to any of the issues which you are called upon to decide. False issues should not delay you in your consideration of the issues and the resolution of the relevant and material facts which I am leaving to you for your decision.

I want to take a moment to talk to the lawyers, to be sure that I haven't misspoken myself on something or omitted something inadvertently; so if you will relax for just a moment, I will talk to them at the side bar and come back to you for your final instruction.

(At the sidebar.)

THE COURT: Are there any exceptions or requests on the part of the Government?

MR. NAFTALIS: None, your Honor. The charge is satisfactory to the Government.

THE COURT: Are there any exceptions or requests on

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the part of the defendant Heimerle?

MR. POLLACK: Your Honor, I would ask the Court to make comment that the Government has produced no evidence as to the counterfeit nature of the bills in question.

THE COURT: There is no need for me to comment on that or overbear or weigh the facts in anybody's favor. It was obvious. I decline to do that.

MR. POLLACK: Any exceptions or requests on the part of the defendant Warme?

MR. WEINGARD: Yes, sir.

I except to your Honor's denial of the remaining requests that I submitted to the Court.

THE COURT: Which requests and in what language are you talking about. I will not accept a general statement.

MR. WEINGARD: All right, sir.

I am talking about Request No. 7, which was a handwritten request which I submitted to you, which detailed by way of illustration what I viewed to be essential on the issue of voluntariness.

I except, of course, to your Honor's refusal to instruct on the law of voluntariness.

THE COURT: Denied except as already charged. I will ask the clerk to mark all of your requests as Court's Exhibit 9.

(Court Exhibit 9 marked for identification.)

MR. WEINGARD: Now, with respect to other exceptions, your Honor made reference to the indictment at the outset of your charge, and you described Count 1 as relating to yellowed -- I am sorry -- Count 2 as relating to the yellowed $100 notes and Count 4 as relating to the better quality $100 notes. That is not the way the counts read, quite obviously, and I must except to your Honor's remarks concerning that.

I would indicate, further along these lines, that by making that reference the Court in essence effectuates an amendment of the indictment, in violation of the Fifth Amendment of the Constitution of the United States, thereby violating the defendant's right to be indicted by a grand jury.

THE COURT: All right.

MR. WEINGARD: I must except to your Honor's reference to the fact that the indictment named four persons, which, insofar as it went, is accurate. I would request that just leaving the fact that the individuals named in the indictment were so named may mislead the jury, and perhaps the jury ought to be instructed that they were named in only one of the four counts and that the only individuals named in the other counts were the defendants on trial.

THE COURT: That is self evident from the form of the indictment, which I promised to give to the foreman and the jury. I will let the matter stand as it is. I made it very clear that Counts 2, 3 and 4 named the defendants Warme and Heimerle, so that suggestion falls of its own weight.

MR. WEINGARD: With respect to your Honor's instructions on accomplices, while I have no difficulty with the specific instruction insofar as it was given, I would except to your Honor's not having mentioned that each of the five individuals, Firessi, Oliveri, Glock, Peters and Horowitz, are accomplices as a matter of law.

I would specifically request that the Court instruct the jury that those five named individuals are indeed accomplices as a matter of law and must indeed be viewed as accomplices as a matter of law.

THE COURT: In other words, you want me to accept as true and charge on behalf of your client that the Government has established through their testimony that they were in fact and are now found to be truthful when they say they were accomplices? Is that what you are suggesting?

MR. WEINGARD: No, sir.

THE COURT: All right. I will stick to the charge as it stands. I think that this was an inadvertence on your part.

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MR. WEINGARD: Your Honor, I must except to the voluntariness instruction that your Honor gave. I must except to your Honor's instruction on the law of confession evidence. Your Honor indicated that the fact that my client gave a statement which, if the jury finds it to be a confession, entitles them to view that as the strongest form of evidence and to give it great weight.

THE COURT: I did not charge that way at all. I said that admissions are a strong form of evidence, and a confession which contains admissions obviously is a strong form of evidence.

In all events, I will stick with the charge as given.

MR. WEINGARTEN: With respect to your Honor's remarks concerning the overt acts, insofar as the conspiracy count is concerned, I must except to your Honor's statement that the jury may find -- may I have a moment, Judge? -- I believe your Honor said that the jury must find that one of the overt acts pleaded in the indictment was committed and that they may base a finding that the conspiracy was completed upon finding that any one of the overt acts was committed.

With reference to Overt Acts (a), (e), (f) and (h), those are alleged overt acts which entail nothing more than

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the meeting of alleged co-conspirators. It is my understanding that meetings between co-conspirators do not constitute overt acts.

THE COURT: Anything else?

MR. WEINGARD: At the conclusion of your Honor's charge, you indicated that these jurors should not be sidetracked from matters not in evidence. That remark, in my view, conflicts with the statement, quite properly given by the Court, as it relates to reasonable doubt, which, of course, can arise from either the evidence in the case or the lack of evidence in the case, and I would ask the Court to clarify that for the benefit of the jury.

THE COURT: All right. I will do this. You may not want me to do it, but I will do it at your request.

MR. WEINGARD: Perhaps I don't understand that.

THE COURT: That is up to you to decide.

MR. WEINGARD: Judge, may I ask the Court, so that I do not put myself in the position where perhaps I am misdirecting the Court, what it is that the Court thinks that I am driving at?

THE COURT: I think all that you are saying is that you want me to charge in your favor rather than evenly, and as long as you want me to mention that they should not be confused or misled or sidetracked by matters not in evidence,

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then --

MR. WEINGARD: Perhaps I can save the Court the remainder of the sentence by withdrawing the request at this point, sir.

THE COURT: I would think so.

All right.

(In open court:)

THE COURT: Mrs. Barnett, we have come to the end of the trial, and I want to thank you for your attendance and patience in being with us, and I will now excuse you from further service in this case.

The clerk advises me that you are expected to return on Tuesday, October 5th, at nine o'clock, in Room 109, for further availability as a juror.

Thank you very much. You are excused.

(The alternate juror left the courtroom.)

(The deputy marshal was duly sworn.)

THE COURT: Mr. Foreman, you will be given paper and pencil. Should it be necessary to communicate with the Court, please do so in writing. Don't communicate with anybody except in writing, and then sign your name to the writing, so that I know it comes fro the foreman of the jury.

THE FOREMAN: Yes, sir.

THE COURT: Will you please, ladies and gentlemen

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of the jury, follow the marshal and commence your deliberations. I will hand you a copy of the indictment.

(At 5:00 p.m., the jury, in the custody of the deputy marshal, left the courtroom to commence deliberating upon a verdict.)

MR. NAFTALIS: Your Honor, I have spoken to counsel for the defense, and the Government would like to mark as Government Exhibit 12 for identification a copy of the redacted affidavit or statement or confession, as you wish, of Richard Warmy, where the Court has crossed out and redacted it.

THE COURT: I think it should be marked Exhibit 12-A for identification.

(Government Exhibit 12-A marked for identification.)

THE COURT: Do you have a clean and redacted version?

MR. NAFTALIS: The Government has marked in evidence Exhibit 10, which represents the retyped second page, and counsel for both sides have had an opportunity to compare the retyped second page with the redacted page, as redacted by the Court.

THE COURT: So Exhibit 10 conforms to Exhibit 12-A, as redacted?

MR. NAFTALIS: That's correct, your Honor.

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THE COURT: All right. I gather that you suggest that we gather the exhibits together. In all probably we will be hearing from them shortly.

(Recess.)

(At 5:40 p.m.)

(Jury in box.)

THE COURT: Mr. Toso, I have your note saying that you would like to see the counterfeit $50 bills. The clerk will hand that to you. You also asked for Warme's signed waiver of rights, and I will hand that to you. That is Exhibit 9.

The further thing that you wanted was Warme's unsigned statement. This is to advise you that I have the unsigned statement in its original form and also in a form that I directed should go to the jury if they requested it. Certain things, with which you are not concerned at all -- and I have not rewritten in any way the contents of what I have allowed to be read to you -- appear on the original. In an effort to have a clean copy of the things that you are properly concerned with and which may be properly before you, I had the Government have a stenographer type up the matters that are properly before you and that were read to you.

You will notice, therefore, that when I give this to you, this being Exhibit 10, the paper and the typewriting

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look different. But this is not the original. The original is the one on which I have marked out matters that are not before this jury.

This is the form in which it was read to you. You are to draw no inference from the fact that the paper is different and the typewriting is different. That was done as a matter of convenience to you, to have a readable paper without a lot of slashes and cut-outs.

Now, with that understanding, I will hand you Exhibit 10.

Thank you very much. I thought it was necessary to explain this to you, so you would not draw any improper inferences from the fact that it does not all look as though it was the same. We have the original, but it also contains things that you are not interested in, and they have been taken out in the retyped version.

THE FOREMAN: That is understandable.

THE COURT: Thank you very much.

(The jury left the courtroom at 6:05 p.m., to resume deliberating upon a verdict.)

MR. WEINGARD: Just, I must take an exception to the supplementary instructions. May I state the reasons?

THE COURT: Yes.

MR. WEINGARD: We all understand, because we were

privy to what your Honor was talking about.

THE COURT: Is there anything incorrect in what I said?

MR. WEINGARD: No, sir, not at all, but the impression that the jury may be left with is that my client, Mr. Warme, may have said things in the original statement which may have incriminated him.

THE COURT: Well, I am not going to reiterate it, because it is perfectly clear, and what I said was exactly accurate as to how this new piece of paper came into being.

MR. WEINGARD: There is no question about it, and I take no exception to that aspect of it, just to the aspect that I put on the record.

(At 9:20 p.m.)

THE COURT: I have a note from the jury, which reads:

"We would appreciate rehearing the portion of your guidelines dealing with how a conspiracy is determined, especially how many overt acts must be proven for a conspiracy to be determined. Is it just one of (a) to (f)?

"Thank you."

Send for the jury.

MR. NAFTALIS: Your Honor, if I may, I just have a

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short direction for your Honor to put to the foreman of the jury, that he is responsible to see that the counterfeit money is brought back when the exhibits are turned in, at the end of the trial.

THE COURT: That is the marshal's problem.

(Jury in box.)

THE COURT: I have two notes, signed by Mr. Toso. The first note states:

"We would appreciate rehearing the portion of your Honor's guidelines dealing with how a conspiracy is determined, especially how many overt acts must be proven for a conspiracy to be determined. Is it just one of those letters (a) to (h)?"

The answer to that is just very short and simple. Any one of the overt acts, if proved, satisfies the requirement of an overt act required to be established for a conspiracy to be proved. Any one, and it aan be a legal act and it can be an illegal act.

For example, suppose two people agree to do something that is wrong, criminally wrong. Now, if the alleged act, the alleged overt act charged, happens to be that Mr. A walked from Duane Street to Chambers Street, ordinarily if a man walks from one place to another, there is nothing illegal about that; but if he took that walk in connection with

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a scheme or a plot that was going on, the legal act takes on a new significance.

So it can be either a legal act or an illegal act, providing that it was related to and is part of and in furtherance of the plan.

In answer to your first question, any single overt act of the many that were named in the indictment, which you have, is enough to satisfy that requirement.

Now, before I go to the next matter about conspiracy, let me turn to the second of your notes. The second note, talking about Count 2:

"Must all things be so, that is, that each involve himself in all transactions, buying, selling, transferring, or does any one constitute the act which is set down in Count 2?"

It isn't buy and sell and exchange and deliver and so on. It is buy or sell or exchange or do any one of the other things. Any one of those things is wrong by the statute, and I will read the statute to you so that you have that clear.

Any one of those things, or aiding another, aiding and abetting another, as I have defined aiding and abetting another, to do any one of those things.

The statute says:

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"Whoever sells or exchanges or transfers or delivers or aids and abets another to do so, any false, forged or altered Federal Reserve notes with the intent that the same be uttered, published or used as genuine" --

Again, it is "or" not "and". So it is any one.

Now, to answer the balance of the first note, in which you ask for the guidelines dealing with how a conspiracy is determined:

A conspiracy is sometimes referred to as a partnership in crime. Concerted action -- that means action taken together -- concerted action for criminal purposes generally makes it possible to accomplish more important and more complex results than those which an individual acting alone could accomplish.

Group association also increases the likelihood that the criminal venture will be successful. At the same time, group association renders detection more difficult than one individual acting alone.

For these and other reasons, Congress enacted a provision of the law which in relevant part is as follows:

"If two or more persons conspire to commit any offense against the United States or to defraud the United States or any agency thereof in any manner or

for any purpose and one or more such persons does any act" -- that is the overt act, any overt act -- "to effect the object of the conspiracy, each shall be guilty of a criminal offense."

That is the conspiracy law, which the defendants on trial are charged with violating.

Conspiracy, or concerted action to violate Federal law, is thus a crime entirely separate, distinct and apart from the substantive law or crime the violation of which may be the object of the conspiracy, the doing of the thing as against the plotting or scheming.

What is conspiracy? A conspiracy is a combination or agreement of two or more persons by concerted action to accomplish a criminal or unlawful purpose or to accomplish a lawful purpose by criminal means.

A conspiracy has sometimes been called a partnership in crime, in which each member becomes the agent of every other member.

To establish a conspiracy, the Government is not required to show that two or more persons sat around a table and entered into a solemn compact, orally or in writing, stating that they formed a conspiracy to violate the law, setting forth the details of the plan, the means by which the unlawful project would be carried out or the part to be played

by each conspirator.

Indeed, it would be most extraordinary if there were such a formal document or specific oral agreement in the case of conspiracy for criminal purposes. Your common sense will tell you that when men in fact undertake to enter into a criminal conspiracy, much is left to the unexpressed understanding. From its very nature, a conspiracy is almost invariably secret in its origin and in its execution.

It is sufficient if two or more persons, in any manner, through any contrivance, impliedly or tacitly, came to an understanding in common to violate the law. Express language or specific words are not required to indicate assent or attachment to a conspiracy.

In determining whether there has been an unlawful agreement, you may judge acts and conduct of the alleged members of the conspiracy, whether named as defendants or only as unindicted co-conspirators, which are done to carry out an apparent criminal purpose. Usually, the only evidence available is that of disconnected acts on the part of the alleged individual conspirators, which acts, however, if taken together in connection with each other, show a pattern of conspiracy or agreement to secure a particular result as satisfactorily and as conclusively as more direct proof.

If, for example, several persons gathered together

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and, shortly thereafter, there was some concerted action among them, with each of them doing something to relate it with the acts of the others, all of which contributed in the same or similar manner towards the accomplishment of the same unlawful objective, such evidence would support the inference that those persons had conspired together to accomplish that purpose.

So you must determine from all the evidence in the case whether or not a conspiracy, as charged in the first count of the indictment, existed. You are not to judge the character and effect of the alleged conspiracy by dismembering it and viewing its separate parts but only by looking at it as a whole.

It is sufficient if from the proof of all the relevant facts and circumstances you find that the minds of at least two alleged co-conspirators met in an understanding way so as to bring about a deliberate agreement to do the acts as charged in the first count of this indictment.

Mr. Toso, does that --

THE FOREMAN: Could I ask you another question in relation to Count 2, whle we are here?

THE COURT: Yes.

THE FOREMAN: Does Count 2 deal specifically with the first batch of hundreds, which was the yellow ones?

THE COURT: Yes.

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THE FOREMAN: And does Count 4 deal specifically with the $100 bills which was the second batch?

THE COURT: Yes.

THE FOREMAN: Neither one overlaps the other? Specifically, Count 2 deals with the first $100 bills, and Count 4 specifically with the second $100 bills?

THE COURT: That was the Government's intention in the indictment.

You may now retire.

(At 9:50, p.m., the jury left the courtroom to resume deliberating upon a verdict.)

MR. WEINGARD: Judge, I most respectfully renew my exceptions with respect to the overt act aspect of your Honor's supplementary charge, and, additionally, I must renew the exceptions and objections that were placed on the record with respect to the way in which the indictment is phrased and the Court's instruction to the jury that Count 4 and Count 2 are in some way differentiated by virtue of the proof which was elicited at this trial.

As I read those particular --

THE COURT: Please don't argue your points. Just make your points, and I will rule on them.

MR. POLLACK: I join in the motion, your Honor.

THE COURT: The motions are denied.

(Recess.)

(At 11:30 p.m.)

(Jury in Box.)

THE COURT: Ladies and gentlemen, it is now approximately eleven-thirty, and since I have not received a report from Mr. Toso, I take it that you are not yet ready to report to the Court; is that correct?

THE FOREMAN: That is correct, your Honor.

THE COURT: Now, several of you live at a distance from the courthouse, and the alternatives are these: I can arrange for your comfort, staying overnight here in the city, if that is what you would like to do, or I can allow you to go home, making sure that there will be no conceivable discussion of this case among yourselves, with anybody else at home or in any other way, or that you will permit anybody to approach you or to discuss it or be influenced by any consideration other than the considerations that you consider when you are all together in the jury room.

Is there a preference that the jury has in the matter of being accommodated in town?

THE FOREMAN: Your Honor, I think we have reached agreement that we would like to go home.

THE COURT: All right. It seems to me that in this kind of a case it would be appropriate for me to follow the

wishes of the jury, cautioning you again -- I can't conceive that there will be any publicity to this case -- but cautioning you against any reading of anything about this case.

You must remember that you know more about this case than anybody on the outside or anybody who might, inadvertently or otherwise intending to influence you about this case, whether consciously or unconsciously. I will therefore excuse you until ten o'clock tomorrow morning. I have arranged with the marshals for transportation to your vicinity, so that we don't have any untoward incidents or delays in getting home.

I will then expect that you will lay this case aside for tonight and take it out of your minds and get a good rest and come back tomorrow morning, to be available again to resume your deliverations at that time.

All right. You may go out now, and the marshals will arrange to convoy you. They have several cars, and maybe the people in upper New York and Westchester can club up in one car and the others in other case, but the marshal will take care of arranging that.

Anyone who wishes to walk home, if you live so close, or take the subway, is at liberty to do that, except that I don't recommend it.

Good night; get a good rest and come back tomorrow

morning, and don't talk, think or do anything about this case until you are all together, the twelve of you, and then you will start again.

I will ask everybody other than the jury to remain in the courtroom until the jury has has ample time to clear out of the courthouse.

(The jury left the courtroom.)

MR. WEINGARD: Your Honor, before we conclude --

THE COURT: We have concluded.

MR. WEINGARD: On a matter of timing, your Honor. The jury will start deliberating here at ten o'clock. I have a nine-thirty calendar in Queens County.

THE COURT: You don't have to show up here before ten-thirty.

MR. WEINGARD: All right, sir. If I am a few minutes delayed, may I give my proxy, so to speak, to Mr. Pollack, in case there are any readings required?

THE COURT: If that is agreeable with your client, and providing he puts it on the record.

MR. WEINGARD: Your Honor, that is agreeable with my client, and I have explained it to him, and he is prepared to put it on the record.

THE COURT: In the event that you are delayed, you wish to have Mr. Michael Pollack act in your place and

stead, and your client, Mr. Warme, so consents on the record; is that right, Mr. Warme?

DEFENDANT WARME: Yes, your Honor.

THE COURT: And, Mr. Michael Pollack, do you consent to act for Mr. Weingard in the event he is not available at the time that we convene tomorrow morning and until he returns here?

MR. POLLACL: Yes, your Honor.

THE COURT: Is that satisfactory to your client that you sholuld represent Mr. Warme and Mr. Weingard's interests?

MR. HEIMERLY: It is, your Honor.

MR. POLLACK: It is, your Honor.

(Adjourned to October 1, 1976, at 10:00 a.m.)

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UNITED STATES OF AMERICA

vs

76 Cr 442

JAMES HEIMERLE and
RICHARD WARME

New York, N. Y.

October 1, 1976 - 10:00 a.m.

(Proceedings continued.)

(At 12:35 p.m.)

(Jury in box.)

THE CLERK: Mr. Foreman, have you agreed upon a verdict as to Count 1, as to the defendant James F. Heimerle?

THE FOREMAN: Yes. The jury has agreed upon a verdict of guilty as to Count 1.

THE CLERK: And Richard G. Warme as to Count 1?

THE FOREMAN: Count 1, guilty.

THE CLERK: You say you find each of the defendants, James F. Heimerle and Richard G. Warme, guilty on Count 1.

THE COURT: Poll the jury.

(Each member of the jury, upon being asked by the clerk of tha court whether the verdict as recorded was his or her verdict, answered affirmatively.)

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THE COURT: Now, Mr. Toso, I have your note indicating that you have not reached agreement on Counts 2, 3 and 4 and that there is a question that you want to raise and request me to tell you whether you may tell me what the basis is of the inability to reach agreement on Counts 2, 3 and 4 as yet.

Now, I am going to do this: I am going to repeat the charge on Counts 2, 3 and 4, because it is reasonably brief, and then -- it is raining outside, so there is no point in sending you out for lunch. We will have lunch brought in for you. Between the time that you go back and the time your lunch arrives and when your lunch comes, please stop. Don't work while you are eating. When you have finished your lunch, then you will go forward.

If after you have heard the charge on Counts 2, 3 and 4 repeated to you you have any question that you want to raise, you may write it out and send it to me, and I will consider what it is that is troubling you that you want instructions on.

Is that procedure clear to you?

THE FOREMAN: Yes, your Honor.

THE COURT: Now, let me read the charge on the substantive counts.

THE FOREMAN: Excuse me, your Honor. Would it be

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possible for me to advise you as to the basic reason why we are hung up, because it is basically a principle reason.

THE COURT: In writing.

THE FOREMAN: I have it here.

THE COURT: All right. Pass it up.

(Pause.)

THE COURT: Well, let me say in response to this form of inquiry that you are the sole judges of the facts, and your resolution of the facts is the one that counts, and if you cannot resolve the facts and are irreconcilably in conflict on Counts 2, 3 and 4, there is nothing I can do but to discharge you from further consideration of the case as to Counts 2, 3 and 4.

It is up to you to decide what testimony you will accept, what exhibits you will accept and what you will not credit. If you have found that anybody is not worthy of your belief, in whole or in part, you do not have to credit that testimony except to the extent that you are willing to do so based upon the evidence, the reasonable inferences flowing therefrom and the circumstances.

You must, in effect, piece together the answers to the questions that may be in your mind that are raised as to Counts 2, 3 and 4. Those are the only ones now before you for consideration.

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I will do this: we will have lunch ordered in for you and permit you to continue your deliberations for a reasonable further time. You will review the evidence in your minds, discuss it, discuss the evidence in respect to each individual, each defendant individually, and make a determination as to what the reasonable inferences are that flow therefrom.

I think that that is probably all I should say at this point, because I want to leave you entirely free to reach your own conclusions on the basis of your own findings fothe facts, and, accordingly, I will ask you to return to the jury room.

Now, let me ask you this before I do that. Would you prefer to go out rather than have lunch sent in? The weather outside is bad. I don't know whether you noticed the rain. We can have lunch brought in for you.

THE FOREMAN: For my part, I would just as soon have lunch here. It makes no difference.

THE COURT: Is that the general consensus?

JURORS: Yes.

THE COURT: All right, Mr. Toso. At this time you can go out and the marshal will arrange to take your orders.

Do the jurors have the exhibits that they had? You may give back any of the exhibits that the jury asked for,

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and you may continue with your deliberations for a reasonable time further.

Thank you.

(At 12:40 p.m., the jury left the courtroom to resume deliberating upon a verdict.)

THE COURT: I think that what we should probably do, gentlemen, in view of the fact that it is going to take at least half an hour for them to get their lunches, I will excuse you to attend to your other business, at least until two-thirty.

MR. WEINGARD: Do you think, your Honor, that it might pay to stay here until about, let us say, five or ten after one, to see whether or not they come to any determination prior to the lunch now?

THE COURT: Well, I will be in the building. I am only trying to accommodate your time.

MR. WEINGARD: And I appreciate it.

MR. NAFTALIS: Counsel for the United States will be remaining in our office.

MR. WEINGARD: Your Honor, may we see the note or notes?

THE COURT: I will have marked the notes that have been received as Exhibits 10, 11 and 12.

(Court's Exhibits 10, 11 and 12 were marked for identification.)

MR. WEINGARD: Just, will you be kind enough to allow us to look at the notes before your Honor leaves, in case there is any exception or objection we have to take, sir?

(At 12:45 p.m., a note was received from the jury.)

THE COURT: The jurors now say, "Can we have the bag with the money in it?"

(Court's Exhibit 13 was marked for identification.)

MR. NAFTALIS: I have the bag and Government's Exhibit 5.

Your Honor, because there is a great deal of counterfeit currency, I have sealed it, and I have instructed the marshal to advise the jurors that they can examine the counterfeit money through the package, and if they wish they can have a few samples removed. There is in excess of $40,000.

THE COURT: I would hope that all the counterfeit currency that goes in comes out.

MR. POLLACK: Your Honor, I believe they have the right to look at the exhibits.

MR. WEINGARD: Yes.

THE COURT: I will not give any instructions. Let

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them have the exhibits as they request.

MR. POLLACK: Are there any notations?

MR. NAFTALIS: No; there is nothing else there. What it is is ten $50 bills et cetera, when they broke them down and tied them up for inventory purposes.

THE COURT: Put them in the bag, in accordance with the request.

MR. POLLACK: Your Honor, may I make an application?

Your Honor, Court Exhibit 12 for identification states that some jurors aren't willing to accept any of the testimony from those witnesses who are co-conspirators, whether named in the indictment or not. I submit, your Honor, on that note, the Court must set aside the verdict of guilty against James Heimerle, as the only evidence against James Heimerle is that of the two co-conspirators.

THE COURT: You see, you are not a juror, and what you are doing is rewriting the jury's verdict. The jury has written a note saying that everybody agreed on the conspiracy count, and what they have said is that the disagreement is thus far on Counts 2, 3 and 4, and the exhibit is addressed to 2, 3 and 4.

I don't want to argue the proposition as to what is going on in the jury's mind. They have been instructed that they are to consider those counts separately as to each

individual and make up their own minds on what the answers are. They have reported a verdict on one of the counts, and they were polled.

You may take your exceptions to anything I may say, but I am not going to stay here and listen to a lot of argument.

MR. WEINGARD: Will you take my reason for an objection on behalf of Mr. Warme, Judge?

With respect to the exhibit marked as Number 11, which was submitted to the Court along with Exhibit 10, as I understand it --

THE COURT: No. They were delivered at separate times in each instance.

MR. WEINGARD: But is it correct for me to believe that --

THE COURT: The only thing that is correct is that we got one note and then we got a second note and then we got a third note and then we got a fourth note, and in the course of my coming down from upstairs, these notes collected.

MR. WEINGARD: My thought is that at the time the jury was in the box and before it handed up note numbered Exhibit 12, which indicates the reason or rationale underlying the difficulty that the jury is having, they had already submitted to the Court an indication requestion some instruction

from the Court as to whether it was proper for the foreman to advise the Court as to the basis for the inability to reach an agreement.

I submit to the Court that the Court at that point ought not to have accepted Exhibit 12, which explains the rationale of the jury as to its inability to reach agreement, and I take exception to the Court's --

THE COURT: You see, that is a piece of hindsight on your part, because I had no way of knowing whether what they were asking for were legal instructions or not, and what I gave them was a strictly legal instruction, without reflecting whatsoever on any of their evidentiary concerns.

You have made whatever statement you are entitled to make, and for whatever value that has, I think that has gone as far as we will go.

MR. POLLACK: Judge, may I have a photostatic copy of these notes?

THE COURT: These are Court's exhibits, and the trial is not over. When the trial is over, you may do whatever you want.

I want you to be perfectly clear in your mind that this trial is not over.

(Recess.)

matters before we start?

THE COURT: What is it you want to be heard on?

MR. POLLAC: Firstly, your Honor, I would ask the Court, I am in a rather ticklish situation in that I have been served with an order to show cause.

THE COURT: Is it something about the problem of returning the 3500 material?

MR. POLLACK: That's correct, your Honor.

THE COURT: We will take that up at another time.

MR. POLLACK: I am afraid it will prejudice my client.

THE COURT: It will not have the slightest effect on your client. This is a matter of your obligation to the Court as an officer of the Court.

MR. POLLAC: Your Honor, the second point is I would like to move the Court to dismiss the notice that my client be treated as a special dangerous offender under Section 3575 of Title 18. I do so, your Honor, on the following ground:

This Court in late May or early June of 1976 set September 13 as a trial date. Shortly prior to September 13 the government came into court and requested an adjournment of this matter. My memory --

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THE COURT: Just a minute. I want to get those dates. Repeat what you said. That in late May or what --

MR. POLLACK: Early June the Court set September 13 as a trial date for this particular case.

THE COURT: Oh, a trial date?

MR. POLLAC: Yes, sir. Shortly before the trial date, Mr. Naftalis, on behalf of the government, came into court and requested on behalf of the government an adjournment, stating as reasons basically that the government had a witness who was ill and other reasons which the government saw fit to grant an adjournment. Mr. Weingard did not object to that adjournment and by silence I acquiesced in his lack of objection. However, your Honor, on the 21st of September or eight days subsequent to the initial trial date, the government saw fit to file this notice of motion.

I submit to the Court that had I been apprised that one of the reasons the government was seeking the adjournment I certainly would never have consented to any adjournment of the trial date because it can only act to the prejudice of my client. I further would direct the Court to 3575(A) in which the Congress, in passing the statute, said that the notice shall be filed a sufficient time prior to trial, a reasonable time before trial.

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I submit to the Court that the very conduct of the government in seeking this adjournment and then during the time in which the Court has given the adjournment to file this notice of motion is not in keeping with the intent of Congress in passing the statute, it takes advantage of the defense in acquiescing to the adjournment on the behest of the government for the convenience of the government and lays open to the defendant further punishment because the government was not ready to proceed and we were not informed prior to the 13th that the purpose of the adjournment was basically to file this notice which subjects my client to a 25-year additional sentence.

THE COURT: You have made a lot of statements, many of which are not factual.

The basis for the adjournment and the continuance was that the co-defendant and trial witness -- I believe it was Peters -- isn't that right?

MR. NAFTALIS: Co-defendant Horowitz, your Honor.

THE COURT: -- Horowitz was in the hospital and could not be brought to court. I was doubtful about granting a continuance until a checkup was made of the man's condition and I granted the adjournment accordingly. So that your premise as to why the government sought the

adjournment has no basis in fact.

Furthermore, it seems to me that the basis of the notice that was sent out was a series of immutable occurrences, namely, prior felony convictions, and what you needed to prepare yourself on that subject I am at a loss to understand.

What do you want to say, Mr. Naftalis?

MR. NAFTALIS: Thank you, your Honor. The government wishes to note for the record that Mr. Pollack has not fairly represented the occurrence up to the date of the 13th of September. The record would fairly indicate that all during the summer and up to and including the 13th of September, continued negotiations took place between myself and counsel for the United States and Mr. Pollack as counsel for the defendant Heimerle.

Mr. Pollack is certainly familiar with Mr. Heimerle's background --

THE COURT: Negotiations to do what?

MR. NAFTALIS: Negotiations with respect to what may be termed a plea bargaining situation. The government indicated to Mr. Pollack on numerous occasions prior to the 13th of September its intention to file a dangerous special offender against this defendant and in fact Mr. Pollack was fully aware of that. Part of the

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negotiations entailed a degree of cooperation on the part of the defendant Heimerle as well as a submission on the part of the defendant Heimerle of certain plates that Mr. Pollack, as counsel for Mr. Heimerle, indicated that Mr. Heimerle would give the government or possibly give the government in exchange for a plea bargain circumstance. These were plates the negatives of which deal with the production of counterfeit and --

THE COURT: Just remember if you are making a speech for the record here, and the reporter would like to take it down. So address yourself so the reporter can hear.

MR. NAFTALIS: Mr. Pollack had indicated on behalf of Mr. Heimerle during the course of those negotiations that if we do not go forward with our planned special dangerous offender there was a possibility that Mr. Heimerle would cooperate with the federal authorities and, in particular, surrender to the federal authorities plates and negatives used in the production of counterfeit Federal Reserve notes in the denominations of 20s, 50s and 100s, $100,000 United States Department of Treasury treasury bills, as well as American Express Travelers Checks.

In light of these factors, the door was left

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open by the government, perhaps unfairly for the government too long, but the government left the door open for Mr. Heimerle through Mr. Pollack to cooperate. It was only on the 13th or shortly before there that Mr. Pollack finally came back to the government with the response of Mr. Heimerle that Mr. Heimerle had no intention of cooperating with the federal authorities whatsoever, would not be willing to enter into any plea agreement at all despite our ongoing conversations of several months in that regard, and that he was planning to go to trial and wanted to go to trial immediately.

Mr. Pollack had been told on repeated occasions -- repeated occasions, your Honor -- that the notice of dangerous special offender was going to be filed against Mr. Heimerle because of his prior criminal record and because the government saw him as a recidivist and wanted to qualify him under 18 U.S.C. Section 3575.

When Mr. Pollack comes before the Court today and implies to the Court that he had never heard of the 3575 papers prior to the filing after the 13th, the filing on the 21st, Mr. Pollack is grossly misrepresenting the record in respect to my ongoing negotiations with him and my conversations in that regard and Mr. Pollack only has to look back to the record in prior litigation with respect

to Mr. Heimerle to know the government has an intent to file a dangerous special offender notice against the defendant Heimerle.

MR. POLLACK: Your Honor, so the record be clear, there were discussions between Mr. Naftalis and myself. There were discussions concerning the statute and having a previous notice filed. However, when we approached trial date and no notice had been filed, counsel assumed the government decided not to file it and this was supported somewhat by the later motion that the government made to withdraw their previous notice which had been filed in a prior case.

THE COURT: We will proceed with the sentencing.

On this hearing called for by the notice, there shall be deemed filed as part of these proceedings the notice dated September 21, 1976, together with the endorsement of the Judge Edmund L. Palmieri dated September 22, 1976, directing that the notice be placed under seal and not to be subject to subpoena or public inspection nor to be delivered to the presiding judge in this case except upon further order of the Court.

That will be deemed Court's Exhibit 1.

xxx (Court's Exhibit 1 marked for identification.)

THE COURT: The subsequent order of Judge

Palmieri dated November 1, 1976, and filed in the Office of the Clerk of the district directing that the sealed notice and order, Exhibit 1, be forthwith delivered to the chambers of the undersigned to be unsealed by the undersigned. This order indicates that it was microfilmed on November 3, 1976, and appears to have been delivered to my chambers on that date together with the envelope in which the papers were sealed, and I thereafter unsealed the papers.

Does the government wish to proceed?

MR. NAFTALIS: Yes, it does, your Honor. The government will note for the record that it will proceed today only under the charges of 18 USC Section 3575(e)(1). The notice charged that the government would offer evidence as to 3575(e)(2) as well. The statute does not oblige the government to charge more than one section and the government feels there is ample evidence to support the claim under 3575(e)(1), so we will proceed in respect to that alone, recognizing the crowded court schedule.

THE COURT: So that somebody reading this record will understand precisely what you consider the two sub-divisions to refer to, please state in summary form what the content is of the sub-division that you are proceeding under and what you are relinquishing.

MR. NAFTALIS: Yes, your Honor.

Your Honor, Section 3575(e)(2) specifies three categories of defendants that the drafters of the Section 3575 envisioned as defendants who would qualify for treatment under the dangerous special offender statute.

In summary, the first section, (e)(1), refers to what may be called the recidivist criminal, the defendant with a prior criminal record. I will come to that in a moment.

THE COURT: That is enough of a statement. You don't have to go any further. What does (e)(2) refer to?

MR. NAFTALIS: It refers to the professional criminal, one who has shown a special expertise or ability and derives his income in large part in a specific criminal endeavor.

THE COURT: All right. Go ahead.

MR. NAFTALIS: With respect to today's proceeding, your Honor, the government will proceed only with respect to (e)(1), the recidivist defendant, and not with the professional criminal.

Your Honor, the government offers as evidence of the defendant James Heimerle's recidivism Government's Exhibits 1, 2, 3, 4 and 5 marked for identification here.

Government's Exhibit No. 1 is a Xeroxed copy

of conviction indicating a sentencing date of November 22, 1971, in which the defendant James Heimerle was sentenced to four years imprisonment with the New York State Department of Correction by the Honorable Louis Wallach in the Criminal Term of the Supreme Court for Queens County, New York. The defendant was convicted of the felony of larceny in the third degree by a plea of guilty.

THE COURT: What was the indictment number?

MR. NAFTALIS: The indictment number on that, your Honor, was Indicment No. 1954-70 for the Supreme Court, Criminal Part, Queens County.

I offer that to the Court.

THE COURT: Any objection?

MR. POLLACK: May I see it?

Your Honor, my client claims that he never appeared before the Honorable Judge Wallach. So I will object on that basis.

THE COURT: Is that a certified copy?

MR. NAFTALIS: Yes, it is, your Honor, certified copy of conviction.

THE COURT: Is there any question about the genuineness of this certification?

MR. POLLACK: No, your Honor.

THE COURT: The document is received as

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Government's Exhibit 1.

xxx (Government's Exhibit 1 received in evidence.)

MR. NAFTALIS: Your Honor, the government further offers Government's Exhibit 2, which is also a certified copy of conviction, a conviction arising from the Supreme Court, State of New York, County of New York. The defendant is James Heimerle. It is Indictment No. 3694-72 and the certified copy of conviction indicates that the defendant James Heimerly entered a plea of guilty to the crime of forgery in the second degree under the 43rd count of the indictment to cover the indictment and also to cover Indictment 3693-72.

Furthermore, the certified copy of conviction indicates that on November 21, 1972, upon the aforesaid conviction by confession the defendant was sentenced by the Honorable Frank J. Blangiardo, a justice of the New York State Supreme Court, to the New York State Department of Correction for a maximum term of four years.

THE CLERK: Any objection?

MR. POLLACK: No objection.

THE COURT: Received without objection.

xxx (Government's Exhibit 2 received in evidence.)

MR. NAFTALIS: The government offers Government's Exhibit No. 3 for identification, a certified copy of

conviction from the United States District Court for the Southern District of New York. The defendant is James Heimerle under Indictment No. 72 Criminal 1330. It reads in part that the defendant on the 18th day of June, 1973, it was adjudged that the defendant upon his plea of not guilty and a verdict of guilty by jury had been convicted of the offense of unlawfully, wilfully and knowingly combining, conspire, confederate and agree together with others to violate Title 18 United States Code Section 472, 473 (a violation of Title 18, U.S. Code, Section 371), and a further violation of unlawfully, wilfully and knowingly and intent to defraud did pass, utter, publish and sell and attempt to pass, utter, publish and sell falsely made, forged, counterfeited 50 and 100 Federal Reserve Notes in violation of Title 18, United St tes Code, Sections 472 and 2.

For this the certified copy of conviction indicates that the defendant was sentenced to a one-year term on each of the counts, counts 1 and 2, to run concurrently with each other and it further indicates the sentence to commence upon his release from confinement under state sentence defendant is presently serving in New York State Penitentiary, Greenhaven, New York. The defendant was further fined $1500 on count 1.

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THE CLERK: Any objection, Mr. Pollack?

MR. POLLACK: No.

xxx (Government's Exhibit 3 received in evidence.)

MR. NAFTALIS: Your Honor, the government also offers Government's Exhibit No. 4 marked for identification, a certified copy of conviction filed in the Southern District of New York. The defendant is James Heimerle. The indictment number is 72 CR. 1331 (CLB).

Your Honor, it indicates in part that upon a plea of guilty and the Court being satisfied that there is a factual basis for the plea, the defendant James Heimerle was convicted of using the mails in executing a scheme and artifice to defraud. This is in violation of Title 18, United States Code, Sections 1341 and 1342.

The Court sentenced the defendant to a four-year probationary period and suspended imposition of sentence on that count. The defendant was subjected to the standing probation order of the Court.

Furthermore, the period of probation, according to this certified copy of conviction, was to commence upon the expiration of the confinement imposed by Judge Carter on June 18, 1973, in 72 CR. 1330. Your Honor, that the Court will note was Government's Exhibit No. 3 now in evidence.

THE CLERK: Any objection, Mr. Pollack?

MR. POLLACK: No. It is an official document.

xxx (Government's Exhibit 4 received in evidence.)

MR. NAFTALIS: The government offers for the Court's consideration Government's Exhibit marked for identification as No. 5, a certified copy of judgment under Indictment 76 CR. 146. The defendant is James F. Heimerle. It reads in part that the defendant had been convicted as charged of the offense of unlawfully, wilfully and knowingly did alter, sell, exchange, transfer and deliver false, forged and counterfeited obligations of the United States. Title 18, United States Code, Section 473 and 472 and furthermore, the defendant was convicted of conspiracy to do so pursuant to Title 18, United States Code 371.

Your Honor, this was before the Honorable Charles M. Metzner, United States District Court Judge for the Southern District of New York, who imposed a sentence on the defendant on June 15 of this year of seven years imprisonment on counts 1 and 2 to run concurrently with each other, a five-year sentence on count 4 to run concurrently with the sentence imposed on each of the counts 1 and 2, and the imposition of sentence on count 3 was suspended and the defendant was placed on probation for a period of five

years to commence upon completion of the sentence imposed on counts 1, 2 and 4 and subject also to the standing probation order of the Court.

MR. POLLACK: Judge, this one I would object to because it is still on appeal.

THE COURT: Objection overruled.

xxx (Government's Exhibit 5 received in evidence.)

MR. NAFTALIS: Your Honor, pursuant to Section 3575(e)(1), a series of standards are set by Congress stating what a dangerous offender is.

THE COURT: Just hold it while I make these notes.

(Pause)

THE COURT: Yes.

MR. NAFTALIS: Thank you, your Honor.

Your Honor, the standards enunciated in Section 3575(e)(1) --

THE COURT: Is this in the nature of argument or is this in the nature of evidence that you are presenting at the hearing?

MR. NAFTALIS: Argument, your Honor.

THE COURT: Have you any further evidence to present?

MR. NAFTALIS: Yes. Your Honor, the government

asks the Court to draw its attention to the Department of Probation report in respect to the defendant Heimerle in respect to this violation and prior criminal history. Specifically the government asks the Court to draw attention to the description and analysis of the defendant Heimerls by the unit manager of the Metropolitan -- I am sorry -- the community treatment center where the defendant Heimerle was incarcerated at the end of his last criminal term with the federal government. This is a federal halfway house, your Honor, here in New York City.

The analysis as offered in the Probation Department report as submitted in the final report of the community treatment center indicated in part, "Prognosis is poor. There is nothing in his behavior indicates that he is in any substantial degree in any desire or intent to lead a law abiding existence in the future."

Your Honor, this determination is present in the Probation Department report which I ask the Court to note and I believe that counsel for the defense has had an opportunity to examine that report before the proceeding today.

With that, the government leaves open its opportunity to make a short argument to it and rests its evidentiary proceeding in respect to the charges under

3575(e)(1).

MR. POLLACK: I interpose an objection to the offer of the last proffered exhibit. It is hearsay in violation of the due process clause and should not be considered under the rationale of Speck against the U.S.

THE COURT: It will be considered under 18 U.S.C. Section 3575 and the statute referred to therein.

Is there any proof that you wish to offer, Mr. Pollack?

MR. POLLACK: May I have a moment, your Honor?

(Pause)

MR. POLLACK: Your Honor, may I ask that the Court make available the probation report to my client?

THE COURT: You have already had it.

MR. POLLACK: I have read it, yes, sir.

(Document handed to Mr. Pollack.)

THE COURT: In addition to the report which you read, Mr. Pollack, I received in my chambers a further two-page memorandum from the Chief Probation Officer which he prepared at my request which is merely a chronological statement of the judgments that have been offered in evidence. I did not have the advantage of having these judgments and I wanted to know the details of it. I am now handing that to you for your inspection.

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MR. POLLACK: Thank you, your Honor.

(Pause)

MR. POLLACK: Your Honor, I only have an argument to make.

THE COURT: Your client has now had a full opportunity to examine the probation report and the addendum to that report?

MR. POLLACK: Yes, your Honor, he has. I would like to submit to the Court that in terms of finding whether or not the prescription of 3575 should be applied at sentencing, that the opinion --

THE COURT: In other words, you rest without offering any further evidence and now wish to make an argument?

MR. POLLACK: Yes, your Honor. I am sorry.

THE COURT: Proceed.

MR. POLLACK: Your Honor, in terms of determining whether or not the defendant should be sentenced under 3575, this Court should not consider any opinion or hearsay evidence which is contained in the probation report submitted by the Court to the defendant and counsel. It is submitted to the Court that the only thing which can be considered in determining whether or not this statute should be invoked in terms of sentencing is evidence which is

competent, material and admissible under the confines of the due process clause subject to cross examination and scrutiny. This does not say that the defendant is arguing that such evidence cannot be considered at the ultimate time of the actual sentencing and in our briefs, your Honor, we make a notation of differentiation between the Speck case and the Williams case. I would submit to the Court that in light of that, that opinion and hearsay material must be excluded from the Court's consideration in determining whether or not 3575 should be invoked.

Additionally, your Honor, I would submit that the government charging document is insufficient in that it fails to charge the defendant with violating Sub-Section (f), it merely charges a violation of Sub-section (e), which is that of a special offender and a second element, that of being a dangerous offender, is subject to proof and this Court has before it no competent proof or evidence adduced by the government indicating the defendant's threat to the community.

Your Honor, at the time of the actual sentencing there will be matter within the probation report we would like to clarify or correct, but in terms of whether or not the Court is going to invoke the sentencing provisions of 3575, I believe that our argument is that the due process

clause must be met, hearsay opinion cannot be considered by the Court and Sub-section (f) was not charged nor submitted to the Court for its consideration in proving that element of the statute. Of course, your Honor, we allege that the statute is not constitutional because of the deficiencies cited in our brief.

THE COURT: I will hear from the government.

MR. NAFTALIS: Thank you, your Honor. I will speak briefly to the leading points raised by Mr. Pollack in his short statement to the Court.

With respect to the constitutionality of the statute, your Honor, the United States refers the Court to U.S. v. Stewart, 531 Fed. 2nd 326, the 6th Circuit opinion dated February 6, 1976, certiorari was denied in respect to that, your Honor.

THE COURT: Is it February or June?

MR. NAFTALIS: February. February was the decision of the 6th Circuit. The certiorari was denied on June 7, 1976.

Stewart upholds the constitutionality, your Honor, of Section 3575 et seq and the entire dangerous offender statute.

THE COURT: What is the citation of the cert. denied?

MR. NAFTALIS: 96 Supreme Court 2629, your Honor.

THE COURT: 2629?

MR. NAFTALIS: That is correct, your Honor.

THE COURT: And that you say was June?

MR. NAFTALIS: That was June 7, 1976, your Honor.

THE COURT: The 6th Circuit case was decided in February?

MR. NAFTALIS: February of this year, February 6, 1976. I have the opinion with me, your Honor.

THE COURT: I have the opinion, too.

MR. NAFTALIS: Thank you.

Your Honor, moreover, the government indicates that a more than prima facie case finding the defendant a dangerous special offender under 18 U.S.C. 3575 does exist. In respect to the standard of dangerous, the government argues that the determination is one to be made by the Court based on the evidence offered and Congress in the legislative history has indicated that the very same evidence supporting the government's charge pursuant to Section 3575(e) may similarly also establish that the defendant is dangerous and, therefore, a proper subject to impose extended prison sentence under 3575 et seq.

Moreover, in respect to the argument as to Speck and the admissibility of evidence, the government respectfully draws the Court's attention and counsel for the defense's attention to Section 3577 of the statute which says in part: "No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a Court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

Your Honor, the government feels that this is strongly within the traditions of Williams v. New York, 337 US 247 and, your Honor, this tradition has been most recently upheld within this very circuit in United States v. Baratta. This is an opinion of the Federal District Court in the Southern District of New York, 360 Fed Supp. 512. That was a 1973 opinion in the Southern District.

In respect to the notion as to what is admissible and what is inadmissible under 3577, the United States believes, most simply put, 3577 is merely a federal codification of a long existent legal standard enunciated in Williams and existent in the model procedures of the American Bar Association, the American Law Student and other model procedures similarly and similar to Section 400.20(5) of the New York State Criminal Procedure Law

which indicates the wide, expansive nature of evidence that can be offered to a Court with respect to the determination of a sentence.

I just wish to speak briefly in respect of the Speck case which the defense has cited repeatedly in its brief and has cited in oral argument here today.

Your Honor, the United States submits that Speck v. Patterson is wholly inapplicable in the instant case. Anyone familiar with the Speck case knows that it deals with an entirely different set of procedures. There wasn't a hearing such as the hearing envisioned under 3575. The right to call witnesses, to cross examine witnesses, to have counsel present, to have the right of subpoena and other rights which are envisioned and set forth in 3575 were not existent in the Colorado State Sex Offenders Act in which Mr. Speck had been sentenced under.

Moreover, an examination of the legislative history of Section 3575 discloses that the Congress was fully aware of Speck v. Patterson in its legislation here and it details in great detail the ways in which Congress has abided by the mandate of the Court in setting forth the constitutional safeguards for defendants under the dangerous special offender statute which are absent under the Colorado statute.

Putting aside Mr. Pollack's legal arguments -- I am sorry, your Honor. I just have to note one further point for the record.

Mr. Pollack notes in his brief that the government's notice is insufficient. Just for the record, your Honor, I wish to note that Mr. Pollack spent all his time in his brief talking about 3575(e)(2) and the insufficiency of that and never bothers to comment on 3575(e)(1), which is the basic underlying charge the government has brought against Mr. Heimerle today and the government has more than met its burden under Duarty and Kelly, the two cases cited by Mr. Pollack, as a basis for indicating that the government's notice in this regard is insufficient.

In that regard, your Honor, if the Court wishes the government would offer Government' Exhibit marked for identification as No. 6, the notice filed in the Duarty case in which the Court by examining it will note that it merely parrots the language of the statute and does not do what the federal government did in the notice filed against the defendant Heimerle today and that is to particularize the reasons for the defendant's classification as a dangerous special offender.

A similar examination will note that the government went to great pains to indicate all the prior criminal

history of Mr. Heimerle that would make him a recidivist under 3573(e)(1), and a comparison with that as opposed to a parroting and tracking of the language of the statute in the Duarty case will show that Duarty is inapplicable as is Kelly in attacking the government's notice filed here.

I will hand up a copy of the Duarty case.

THE COURT: That isn't necessary.

MR. NAFTALIS: I will speak to the government's basic contention.

THE COURT: I read your briefs. Is there anything other than that in your briefs you want to bring to my attention?

MR. NAFTALIS: Your Honor, the government has nothing further. The government will rest on its evidence and its previous arguments.

THE COURT: I will proceed with the sentencing and the allocution.

Is there anything you want to say on behalf of the defendant Heimerle, Mr. Pollack, before imposition of sentence?

MR. POLLACK: Yes, your Honor. The defendant Heimerle is -- there are several matters in the presentence report which are taken exception to, one of which is the allegation that there was a Class A conspiracy -- a

conspiracy to violate a Class A felony in New York State, namely, the distribution of cocaine in a quantity of five kilograms. Mr. Heimerle says there has never to his knowledge been an indictment to that effect, no charge brought against him to that effect, that he is unaware where that allegation comes from and that it has no bearing to him to his knowledge.

Your Honor --

THE COURT: Does he also say he was not involved in any such transaction?

MR. POLLACK: Yes, your Honor, he does.

THE COURT: All right, I will disregard it.

MR. POLLACK: Your Honor, I ask the Court to disregard the opinion in the probation report concerning the prognosis for the defendant. I would state to the Court that the Court should sentence the defendant based on his conduct in this case and should base his decision on the probation report on facts and not institutional opinion of him or prognoses of him.

THE COURT: Which probation report? I understood that your client declined to be interviewed for the report and that you were so advised in writing on October 22.

MR. POLLACK: That's correct, your Honor.

THE COURT: And that all information in respect

to your client has been obtained from the earlier reports in connection with the felonies on which he was previously sentenced.

MR. POLLACK: Yes, your Honor.

THE COURT: All right. Go ahead.

MR. POLLACK: I would submit to the Court that the defendant is presently incarcerated on a sentence imposed by the Honorable Judge Metzner for seven years, that the conduct on which he is sentenced there happened in the exact same time frame period, your Honor, as the conduct on which this Court heard testimony. I submit to the Court that the government could have brought one indictment against the defendant for conduct in the same period alleging the same offense and the same material elements of those offenses.

THE COURT: Were the witnesses the same?

MR. POLLACK: No, your Honor, they were not.

THE COURT: All right.

MR. POLLACK: Your Honor, I submit to the Court that the defendant has been convicted of a conspiracy to violate the counterfeiting laws and that his sentence should be in conformity with the sentences given out and proscribed by that statute. The individual at the time of his arrest was in fact employed. The employment was

[728]

verified. He had in fact asked for permission to leave the State of New York and move to the State of Colorado, and he was intending to go.

I submit to the Court that the sentence provided for in the statute is certainly sufficient. There is no necessity of enacting a statute which enlarges the period of time for which a defendant can be incarcerated especially under the fact of this case and the facts before this Court and the facts of the defendant's behavior in the two-month period which have already rendered him subject to a seven-year period of incarceration. I submit to the Court to add time to the statutory proscription would be unnecessary and unwarranted under these facts.

I submit to the Court it has before it sufficient scope of sentencing latitude so as to fulfill whatever responsibility is necessary in terms of the defendant. I submit to the Court that since the conduct is in the same time period and of the same nature as has already been determined by a jury that the Court should consider very seriously a concurrent sentence so the defendant's conduct, while it has been disapproved by society and is subject to punishment, is seen for what it is, and that is one source of conduct over a two or three-month period and not put the defendant in the position of

being subject to consecutive time or consecutive imprisonment based upon the fact that he did something wrong and in a very short period of time.

I submit to the Court there was no violence involved in this. There is no violence involved in any of these allegations the government has brought forth against the defendant. They involve basically two particular sets of circumstances. One involved airline tickets, one involved counterfeit money in 1971. He was indicted and convicted on both the state and federal level of each. This led to four convictions on the same two sets of circumstances.

Additionally here, your Honor, we are dealing with counterfeit money of the same denominations in the same time span and the same locality. To sentence the defendant, again, consecutively I believe would be excessive under the latitude provided to the Court.

Your Honor, that would be what I would ask the Court at this time.

THE COURT: James Heimerle, is there anything that you want to say on your own behalf before imposition of sentence?

THE DEFENDANT: No, sir.

THE COURT: I think the government's position

has been made clear heretofore in its argument on the special offender statute. Is that right?

MR. NAFTALIS: That is correct, your Honor.

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OPINION AND FINDINGS

(Pollack, District Judge)

The opinion and findings of the Court are as follows:

On this sentencing proceeding, the government seeks to invoke the Court's statutory power, 18 U.S.C. Sections 3575-77 (1970) to enhance the sentence of a convicted felon for a period significantly beyond the ordinary statutory maximum for that felony, which in this case is five years, on the ground that the defendant, James F. Heimerle, is a dangerous, a habitual offender.

The hearing prescribed by the statute has been held before the Court on the government's notice duly filed and served herein specifying that the defendant is a dangerous special offender.

Heimerle is a recidivist who has been convicted in a very narrow time frame of a significant number of previous felonies. The Court's assessment of the defendant's past record and present demeanor warrant the findings (1) that the defendant has committed a series of felonies within the statutory time frame or conspired so to do; and (2) that the defendant is a dangerous offender within the contemplation of the statute. There is no need for a psychiatric evaluation

[732]

of defendant's mental state to reach a fair inference which is made herein that the defendant is dangerous. See 89 Harvard Law Review 357, note 10; 18 U.S.C. Section 3575(f)(1970); Model Penal Code, Sections 7.03(2), 7.04(2) (Approved Draft 1962).

The triggering felony in this case is conspiracy to violate the laws against engaging in counterfeiting or dealing in counterfeit Federal Reserve Notes.

The defendant has challenged as unconstitutional the statute and the procedural informality on these sentencing proceedings for reaching the requisite findings on which to enhance the scope of the statutory ordinary maximum penalty that could be imposed on the triggering felony. The defendant contends that trial standards must be but have not been used to reach the requisite findings for an enhanced penalty.

The notice which preceded this hearing duly specified and the Court finds that the defendant is a dangerous special offender within the definition of Sections 3575(e) and (f) in that he has previously been convicted in the courts of the United States and the State of New York for two or more offenses committed on occasions different from one another and from the felony on which he was convicted in this court on

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October 1, 1976; that the offenses on which he was previously convicted were punishable by imprisonment in excess of one year; that for one or more of such previous convictions the defendant has been imprisoned prior to the commission of the felony in this case; and that less than five years have elapsed between the commission of the felony in this case and the defendant's release on parole or otherwise from imprisonment for one such previous conviction and his commission of the last such previous offense and less than five years have elapsed between the commission of the felony in this case and another offense punishable by imprisonment in excess of one year under applicable laws of the United States and the State of New York within the meaning of Title 18, U.S.C. Section 3575(e)(1).

In more detail, the evidence competently establishes the following:

1. On October 4, 1975, the defendant pleaded guilty to the felony of larceny, and on November 22, 1971, Judge Wallach in the Supreme Court, Queens County of the State of New York, sentenced the defendant to a term of imprisonment of four years.

2. On October 16, 1972, the defendant pleaded guilty to the felony of forgery, and on November 21,

1972, he was sentenced in the Supreme Court of the State of New York, New York County, by Judge Blangiardo, to a term of four years imprisonment. That sentence was in Docket No. 3694-72 and was intended to cover Indictments 3693-72 and 3174-71.

3. On June 18, 1973, in the United States District Court for the Southern District of New York, Judge Carter sentenced the defendant in pursuance of a jury verdict after trial on the felony of conspiracy to violate the laws against counterfeiting to a term of one year imprisonment and a $1,500 committed fine (Docket No. 72 Criminal 1330).

4. On July 23, 1974, in the United States District Court for the Southern District of New York, pursuant to his plea of guilty to the felony of using the mails in executing a scheme and artifice to defraud, Judge Brieant sentenced the defendant by directing that imposition of sentence on count 2 in Indictment 72 Criminal 1331 be suspended and the defendant be placed on probation for a term of four years, subject to the standing probation order of the court, the probation to commence upon expiration of confinement imposed by Judge Carter on June 18, 1973, in 72 Criminal 1330.

5. On May 5, 1976, the defendant was convicted

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by a jury of the felonies of conspiracy to violate the laws against counterfeiting obligations of the United States and substantive offenses in connection therewith, and on June 15, 1976, Judge Metzner, in the United States District Court for the Southern District of New York, Docket No. 76 Criminal 146, sentenced the defendant to confinement for a period of seven years on each of counts 1 and 2 to run concurrently with each other, and five years on count 4 to run concurrently with the sentence imposed on each of counts 1 and 2, and imposition of sentence on count 3 was suspended and the defendant placed on probation for a period of five years to commence upon completion of the prison term imposed.

Were there no question of the application hereto of the dangerous special offender statute, the sentence of this Court would impose on the defendant Heimerle a term of five years imprisonment and a $10,000 committed fine to run consecutive to previous sentences imposed in this court mentioned above, including any confinement that might be imposed on Heimerle for violation of probation sentences. However, finding it appropriate to do so, the Court will enhance the sentence and sentence Heimerle as a dangerous special offender for the protection of the public.

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This defendant will pose a danger to other persons in the community. He probably is suffering from a severe personality disorder indicating a propensity toward criminal activity. Protection of the public from further criminal conduct on his part is required. He is dangerous in that sense.

The defendant's attack on the statute and method of proof thereunder lacks merit.

It has been squarely held that the statute here involved is constitutional, is not void for vagueness and that the term "dangerous" as used and defined in the statute is not unconstitutionally vague. U.S. v. Stewart, 531 F.2d 326 (6th Circuit 1976), cert. denied 96 Supreme Court 2629 (June, 1976.

It has further been held that such sentencing statutes as the one before the Court do not require or obligate the government to establish the applicability of the statutes by the mold of trial-type procedures and standards of proof which are requisite in determining guilt or innocence. The factors on which the judge chooses to rely in a sentencing proceeding do not have to meet any specified burden of proof. Sentencing is not encumbered by the procedural formality required at trial. Williams v. N.Y., 337 U.S. 241 (1949).

So long as the enhanced sentence is not disproportionate with the circumstances, the sentence remains one only for the crime of which the defendant was convicted, that is the concept which the description of the felon as dangerous must fit - the danger of recidivism and the burden therefrom on society is what the sentencing judge appraises here.

The presentence report to the Court which the defendant has examined covers the defendant's background, character and behavior pattern over a substantial period of time antedating the felony which brought him before this Court. This was appropriate information to be considered hereon. 18 U.S.C. Section 3577.

What is here involved is a fair estimate of the defendant's character, associates and behavioral characteristics. For this only a preponderance of the evidence is needed on which to predicate a just sentence. See 89 Harvard Law Review 356 (1975).

The foregoing shall constitute the Court's findings and conclusions as required by the statute.

U. S. D. J.

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Accordingly, it is the judgment of the Court that the defendant be committed to the custody of the Attorney General or his authorized representative on count 1 in 76 Crim. 442 as a dangerous special offender pursuant to 18 U.S.C. Section 3575 and Title 18, U.S.C. Section 371 for a term of ten years, this sentence to be consecutive to the sentence of imprisonment imposed by Judge Charles M. Metzner in this court on June 15, 1976, under Indictment No. 76 Criminal 146 and consecutive to any confinement that may be imposed hereafter for violation of the probation imposed by Judge Charles L. Brieant, Jr. in sentence under Indictment No. 72 Criminal 1331.

In addition, the defendant is fined under 76 Criminal 442 the sum of $10,000 which shall be a committed fine.

The remaining counts of the indictment have heretofore been severed following a mistrial on those counts and an application to so declare by the defendant. What disposition does the government wish to make in respect to the open counts?

MR. NAFTALIS: Your Honor, the government will move to move the remaining counts, 2, 3, and 4 of 76 Cr. 442.

THE COURT: Motion granted. The defendant is

remanded.

MR. POLLACK: May I make an application that the defendant be provided with CJA and get a transcript?

THE COURT: Upon proper application the Court will give consideration to it. The defendant is advised of his right to appeal from the conviction and judgment entered herein and he is also advised that his present counsel is expected to continue in event of any appeal and in the event that proper evidence is submitted thereof, the Court will give consideration to whether or not he is entitled to any relief under the Criminal Justice Act in connection with the taking of any such appeal.

MR. POLLACK: Judge, may I give the Court's clerk a copy of the Notice of Appeal?

THE COURT: Give it to the clerk. I do not file such notices.

There is also, as I called your attention, Mr. Pollack, a charge that has been served of violation of the probation fixed by Judge Charles Brieant in that the defendant was convicted of the unlawful sale of counterfeited notes and conspiracy so to do under Indictment 76 Criminal 146 in this court and convicted of conspiracy to deal in counterfeit currency on October 1, '76 under under Indictment 76 Criminal 442 and that the probationer associated

[740]

with a known felony offender.

Are you prepared to plead to those charges?

MR. POLLACK: Your Honor, I believe Mr. Heimerle wishes to plead not guilty to those charges. I have not had an opportunity to discuss it with him. I was served only this morning so I don't know what the Court wants to do.

THE COURT: A not guilty plea will be entered therein. Are you ready for sentence in that connection in view of the nature of the matter and the immutable facts involved.

MR. POLLACK: I am reluctant to do anything on that matter until I talk to him about it.

THE COURT: The matter is adjourned for sentence for two weeks.

MR. POLLACK: The defendant denied the specifications.

THE COURT: That is what I understood you to say, Mr. Pollack?

MR. POLLACK: I entered a not guilty plea, yes. I must confess I am at a loss. I have not dealt with the issue. I don't know what the issue is.

THE COURT: In the meantime what you have done is to enter a denial by saying not guilty; is that right?

MR. POLLACK: Yes, sir.

Judge, may Mr. Naftalis and I approach the bench on another matter?

THE COURT: No. We will take all matters in this case in open court. What is it you want?

MR. POLLACK: The Court has set down next Monday for an order to show cause against counsel. I have a scheduled meeting before Judge Dear in the Eastern District.

THE COURT: What date do you want?

MR. POLLACK: Any date other than that, your Honor. I am available tomorrow, Wednesday or Friday, your Honor, in the morning.

MR. NAFTALIS: That is acceptable to the government, your Honor.

THE COURT: Suppose we make it Friday at 9:30.

MR. NAFTALIS: Acceptable to the government, your Honor. In this courtroom?

THE COURT: Yes.

MR. NAFTALIS: Your Honor, if I may, on the 29th of November, which I believe is two weeks from today --

THE COURT: We will make it three weeks from today.

* * * * *

THE DEFENDANT: No, sir.

THE COURT: Mr. Naftalis, is there anything the government wants to call to the Court's attention?

MR. NAFTALIS: No. I believe the Court had ample opportunity to observe the defendant in pretrial proceedings, during the trial, during the suppression hearing and has had an opportunity to view both him and his character and demeanor. I will leave it up to the judgment of the Court and the report of the Probation Department.

THE COURT: So far as the Probation Department refers to the alleged statement by the defendant and characterizes it as an affidavit, the details of the procurement of that statement and its background were fully exposed to the Court at the suppression hearing on September 17, 1976, and the Court will be guided by what was made a matter of record in that connection rather than the version of the probation officer.

The emphasis in connection with this sentence is not on the general character of the defendant in the sense that the Court has been apprized of the circumstances in relation to Angelo Oliveri but rather on the general background of the defendant. his prior criminal record

to the extent that he has one and the circumstances of the felony as established on the trial of this case.

It is the judgment of the Court that the defendant be committed to the custody of the Attorney General for a term of three years on count 1 of the indictment. A mistrial was declared on counts 2, 3 and 4, and those counts remain open.

Is there any disposition to be made of those counts?

MR. NAFTALIS: Yes, there is, your Honor.

The government moves to dismiss counts 2, 3 and 4 of Indictment 76 Cr. 442. In addition, your Honor, the Court may remember that 76 Cr. 442 was a superseding indictment and there is a prior outstanding indictment which the Court left open until the sentencing day, and that is 76 Cr. 243. The government will also move to dismiss 76 Cr. 243 as to Richard Warme.

THE COURT: I take it you have no objection, Mr. Weingard?

MR. WEINGARD: Absolutely none whatsoever, your Honor.

THE COURT: Counts 2, 3 and 4 of Indictment 76 Criminal 442 are dismissed, and Indictment 76 Criminal 243 is dismissed on the government's motion.

GOVERNMENT'S EXHIBIT 7
IN EVIDENCE

Certified Copy of Prior Conviction-
Heimerle (Judge Carter)

GOVERNMENT'S
EXHIBIT
U. S. Dist. Court
S. D. of N. Y. 1976
SEP 30

(Rev. 2-63) Cr. Form No. 25

U.S. DISTRICT CO
FILED
JUN 18 1973
S. D. OF N.Y.

ited States District Court
FOR THE
OUTHERN DISTRICT OF New York

of America

No. 72 Cr. 1330

JAMES HEIMERLE

On this 18th day of June, 19 73 came the attorney for the government and the defendant appeared in person and[1] by Joseph Fontana, Esq. of Counsel, the defendant having been brought to court on a Writ of Ad Prosequendum.

IT IS ADJUDGED that the defendant upon his plea of[2] Not Guilty, and a verdict of guilty by a Jury.
has been convicted of the offense of unlawfully, wilfully and knowingly combine, conspire, confederate and agree together with others to violate Title18 U.S.Code, Section 472, Section 473 (Title 18 U.S.Code, Section 371) unlawfully, wilfully and knowingly, and intent to defraud, did pass, utter, publish and sell, and attempt to pass, utter, publish and sell, falsely made forged counterfeited fifty and one hundred dollar Federal Reserve notes (Title 18 U.S.Code, Section 472 & 2)

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By [signature]
Deputy Clerk

as charged[3] in Counts 1 and 2.
and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] ONE (1) YEAR on each of counts 1 & 2, to run concurrently with each other. Sentence to commence upon his release from confinement under State sentence defendant is presently serv-

ing at New York State Penitentiary, Greenhaven, New York. Defendant is FINED $1,500.00 on count 1 only. If the fine is not paid as directed, the defendant is to be committed or he is otherwise discharged according to law.

IT IS ADJUDGED that[5]

Defendant advised of his right to appeal.

JUL 2 9 1975

5/3/76 ag

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

OK P.R.

Robert L Carter

United States District Judge.

The Court recommends commitment to[6]

Raymond F. Burghardt

Clerk.

[1]Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2]Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3]Insert "in count(s) number " if required [4]Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence: (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5]Enter any order with respect to suspension and probation. [6]For use of Court to recommend a particular institution.

JUL 2 9 1975

150 Cash - Fine

8/11/75 - Fine marked satisfied and entered in money judgment book. MA

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on to

Defendant noted appeal on

Defendant released on

Defendant elected, on , not to commence service of the sentence.

Defendant's appeal determined on

Defendant delivered on to

at , the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

United States Marshal

Receipt NO. 027433

Form No. USA-200
(Rev. 3-3-58)
Form approved by
Comp. Gen., U. S.

DEPARTMENT OF JUSTICE
Office of United States Attorney
~~Southern~~ District of ~~New York~~
(CHECKS ACCEPTED SUBJECT TO COLLECTION)

JUL 29 1975

Claim Against: James Heimerle	U. S. Attorney's No. 72 4063
Amount Received: One Thousand FIve Hundred and 00/100 Dollars-------- -----1,500.00----	From
Agency & File No.: USDC,SDNY 72 CR 1330	Pais in full

Type Claim	Amt. of Claim	DJ File No.		
Fine	$ 1,500.00		( ) Pre-judgment (X) Judgment ( ) Compromise	(X) Paid in full ( ) Partial Pay No.

Date Payment Received: July 28,1975

By: Edith Kaltman, clerk UNITED STATES ATTORNEY

DUPLICATE WITH REMITTANCE

GOVERNMENT'S EXHIBIT 8
IN EVIDENCE

Certified Copy of Prior Conviction -
Heimerle (Judge Metzner)

United States of America vs.

SOUTHERN DISTRICT OF NEW YORK

DEFENDANT: James F. He

GOVERNMENT'S EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.
8 SEP 30 1975

DOCKET NO.: 76 cr. 146

JUDGMENT

COMMITMENT ORDER

MONTH	DAY	YEAR
June	15	1976

COUNSEL

In the presence of the att[orney] the defendant appeared in person on the date of this judgment.

[ ] WITHOUT COUNS[EL] ... nt of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Michael B. Pollack Esq.
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged
[X] GUILTY.

Defendant has been convicted as charged of the offense(s) ofunlawfully, wilfully and knowingly did alter, sell, exchange, transfer and deliver false, forged and counterfeited obligations of the United States.
(Title 18, United States Code, Sections 473 and 2.)
and a conspiracy so to do.
(Title 18, United States Code, Section 371.)
as charged in counts (1)(2)(3) and (4).

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SEVEN(7)YEARS on each of counts (1) and (2) to run concurrently with each other.
FIVE(5)YEARS on count (4) to run concurrently with the sentence imposed on each of counts (1) and (2).
The imposition of sentence on count(3) is suspended and the defendant is placed on probation for a period of FIVE(5)YEARS to commence upon completion of sentence imposed on each of counts (1)(2) and (4), and subject to the standing probation order of this Court.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

MICROFILM

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

U.S. JUN 15 1976 S. D. OF N. Y.

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

Charles M. Metzner

Date June 15, 1976

(6)

A true copy

A. Daniel Fusaro

Clerk

GOVERNMENT'S EXHIBIT 9 IN EVIDENCE

A-404

Warning and Consent to Speak

WARNING AND CONSENT TO SPEAK

EXHIBIT 9

WARNING OF RIGHTS

You must understand your rights before we ask you any questions.

You have the right to remain silent.

Anything you say can be used against you in court, or other proceedings.

You have the right to talk to a lawyer for advice before we question you and to have him with you during questioning.

If you cannot afford a lawyer and want one, a lawyer will be appointed for you by the court. If you decide to answer questions now without a lawyer present, you will still have the right to stop the questioning at any time. You also have the right to stop the questioning at any time until you talk to a lawyer.

I have read this statement of my rights and it has been read to me, and I understand what my rights are.

Date 3-1-76 Richard Wayne
Signature

Time 12:35 PM

WAIVER

I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or force of any kind has been used against me. I hereby voluntarily and intentionally waive my rights and I am willing to make a statement and answer questions.

Date 3-1-76 Richard Wayne
Signature

Time 12:35 PM

CERTIFICATION

I hereby certify that the foregoing Warning and Waiver of Rights were read by me to the above signatory, and that he also read it and has affixed his signature hereto in my presence.

Witness

Witness

John Rezes
Signature

UNITED STATES SECRET SERVICE

SSF 1737 (04-73)

GOVERNMENT'S EXHIBIT 10 IN EVIDENCE

Warme's Confession (Redacted as submitted to Jury)

AFFIDAVIT

United States of America
_____ District of _____

File No. J-108-CO-5539-1
S271.

I Richard Warme stated that I have been advised by SA Vezeris, United States Secret Service, that under the provisions of the Constitution I have certain rights: The absolute right to remain silent, and that anything I say can be used against me in court of law or any other proceedings; that I have the right to consult with an attorney before answering any questions or making any statements, and that if I cannot afford an attorney and want one, that one can be appointed for me before I say anything; and if I decide to make any statements now, without an attorney present, I have the right to stop the questioning at any time.

Knowing and understanding these rights I hereby make the following statement:

In November 1974, I met with Bernie Horowitz who had have known for about 8 years. During this meeting, Horowitz asked me if I was interested in purchasing counterfeit notes. I said that I was. Bernie then told me that he would try and get in touch with his people and try and get notes that day. He could not get in touch with his people. He called me that night, and told me to meet him 10:30 the next morning. I met Horotitz and another individual introduced to me as Joe, the next day at Horowitz's house. When I met them at Bernie's house, they both provided me with sample $100 bills and said that the bills would cost me $60 for $1000 in bills. I took a sample of the $100 bill and told them that I would get in touch with them. They also told me that in a couple of days or a week's time that $20 bills would be available.

A few days later, Bernie called me and told me that they were having problems getting $20 bills. He said that the bills were ready but that the serial numbers and the seal still had to be put on the notes. Bernie then asked me if I was interested in taking some of the $100 bills instead of the $20 bills at that time. He offered me $25,000 in $100 bills but I told him I did not need that many but I would try and see what I could do with $10,000 in $100 bills. Bernie then gave me $10,000 in counterfeit $100 bills which he got from the freezer of his refrigerator and gave these to me on consignment. I then took the $10,000 in counterfeit bills and when to see Angelo Oliveri at Palumbo Distributors in the Bronx.

At this time, I asked Angelo if he was interested in the $100 counterfeit bills and he took the whole $10,000 package.

I have read the foregoing statement consisting of 2 pages. I fully understand this statement and it is true and correct to the best of my knowledge. I have made the corrections shown.

I made this statement freely and voluntarily, without any threats, rewards or promises or immunity in return for it.

Subscribed and sworn to before me this day May 1 19 76
at N.Y. N.Y.

Signature

Title

The next day, I stopped by Palumbo Distributors and Angelo told me that he and his son, Robert, and Larry had found a way to treat the bills to make them look better. During the conversation with Angelo, Robert and Larry, Angelo stated that he had given the package to a friend of his known as Joe Corbo. During the conversation, Angelo, Larry and Robert also asked me when I could get them the $20 bills that I said were available. I told them that it would take a couple of more days.

About a week later, Bernie's friend Joe called me and told me to meet him at Krums Restaurant on Grand Concourse in the Bronx. After meeting him at Krums, Bernie's friend Joe showed me 5 sample $20 counterfeit bills.

On the same date, I took these samples to Palumbo Distributor and showed them to Angelo, Larry and Robert. Angelo, Larry and Robert told me they were interested and that I should get as many notes as I could get.

The next day, I got a call from Bernie's friend Joe who told me that he had the package of $20 bills that I wanted.

Joe were going to sell me this package for $140 in genuine money for each $1000 in counterfeit. I did not have the genuine money to pay for the package and would return in about an hour. At that time, I called Angelo Oliveri at Palumbo Distributor and he, Robert and Larry then came to my house in Irvington with about $3,000 in genuine money. I then gave the $40,000 in counterfeit to Angelo, Robert and Larry in two lunch boxes. A short time later Joe returned and I gave the $3,000 for a partial payment for the package. I told Joe I would pay the remainder owed on the pagkage in 3 or 4 days.

About 3 days later, I met Joe at the Tiffany Diner at 4th Avenue in Brooklyn. During this meeting, I did not yet have the money to pay for the package delivered earlier.

This meeting ended with my agreeing to pay the difference on the package in a couple of weeks.

I then went back to Angelo Oliveri to get the money he owed me and he told me that he could not get rid of the entire package. Oliveri then gave me about $300 more and the remainder of the package he had ($9700). Out of the $9700 that was given back to me by Oliveri, I gave $200 to Fred Gluck, and destroyed $7700.

A-408

GOVERNMENT'S EXHIBIT 11 FOR IDENTIFICATION

Warme's Confession (as given)

(11)

AFFIDAVIT

United States of America
District of

File No. J-108-CO-5539-1
9570.

I Richard Warne stated that I have been advised by SA Vezeris, United States Secret Service, that under the provisions of the Constitution I have certain rights: The absolute right to remain silent, and that anything I say can be used against me in court of law or any other proceedings; that I have the right to consult with an attorney before answering any questions or making any statements, and that if I cannot afford an attorney and want one, that one can be appointed for me before I say anything; and if I decide to make any statements now, without an attorney present, I have the right to stop the questioning at any time.

Knowing and understanding these rights I hereby make the following statement:

In November 1974, I met with Bernie Horowitz who had have known for about 8 years. During this meeting, Horowitz asked me if I was interested in purchasing counterfeit notes. I said that I was. Bernie then told me that he would try and get in touch with his people and try and get notes that day. He could not get in touch with his people. He called me that night, and told me to meet him 10:30 the next morning. I met Horotitz and another individual introduced to me as Joe, the next day at Horowitz's house. When I met them at Bernie's house, they both provided me with sample $100 bills and said that the bills would cost me $60 for $1000 in bills. I took a sample of the $100 bill and told them that I would get in touch with them. They also told me that in a couple of days or a week's time that $20 bills would be available.

A few days later, Bernie called me and told me that they were having problems getting $20 bills. He said that the bills were ready but that the serial numbers and the seal still had to be put on the notes. Bernie then asked me if I was interested in taking some of the $100 bills instead of the $20 bills at that time. He offered me $25,000 in $100 bills but I told him I did not need that many but I would try and see what I could do with $10,00o in $100 bills. Bernie then gave me $10,000 in counterfeit $100 bills which he got from the freezer of his refrigerator and gave these to me on consignment. I then took the $10,000 in counterfeit bills and when to see Angelo Oliveri at Palumbo Distributors in the Bronx.

At this time, I asked Angelo if he was interested in the $100 counterfeit bills and he took the whole $10,000 package.

I have read the foregoing statement consisting of 2 pages. I fully understand this statement and it is true and correct to the best of my knowledge. I have made the corrections shown.

I made this statement freely and voluntarily, without any threats, rewards or promises or immunity in return for it.

Subscribed and sworn to before me this day May 1 19 76
at N.Y.C., N.Y.

Signature

Title Special Agent

3/11/76
J-101-cw-

The next day, I stopped by Palumbo Distributors and Angelo told me that he and his son, Robert, and Larry had found a way to treat the bills to make them look better. During the conversation with Angelo, Robert and Larry, Angelo stated that he had given the package to a friend of his known as Joe Corbo. During the conversation, Angelo, Larry and Robert also asked me when I could get them the $20 bills that I said were available. I told them that it would take a coupe of more days.

About a week later, Bernie's friend Joe called me and told me to meet him at Krums Restaurant on Grand Concourse in the Bronx. After meeting him at Krums, Bernie's friend Joe showed me 5 sample $20 counterfeit bills.

On the same date, I took these samples to Palumbo Distributor and showed them to Angelo, Larry and Robert. Angelo, Larry and Robert told me they were interested and that I should get as many notes as I could get.

The next day, I got a call from Bernie's friend Joe who told me that he had the package of $20 bills that I wanted and a guy named "Jimmy" who I had met once before came to my house in Irvington with $40,000 in $50 and $20 counterfeit bills.

Joe and Jimmy were going to sell me this package for $140 in genuine money for each $1000 in counterfeit. I then told them that I did not have the genuine money to pay for the package and they told me to make my connection for the money and they would return in about an hour. At that time, I called Angelo Oliveri at Palumbo Distributor and he, Robert and Larry then came to my house in Irvington with about $3000 in genuine money. I then gave the $40,000 in counterfeit to Angelo, Robert and Larry in two lunch boxes. They then left my house. A short time later, Joe and Jimmy returned and I gave them the $3000 for a partial payment for the package. I told Joe and Jimmy I would pay them the remainder owed on the package in 3 or 4 days.

About 3 days later, I met Joe and Jimmy at the Tiffany Diner on 4th Avenue in Brooklyn. During this meeting, I told them that I did not yet have the money to pay for the package they had delivered earlier. During the conversation, Jimmy mentioned to Joe that he was getting worried about whey they were printing because they were printing late at night and he was afraid that the noise would bother some of the tenants who lived above them. He also stated that some of the printing was being done in a print shop that was borrowed from someone else. This meeting ended with my agreeing to pay them the difference on the package in a couple of weeks.

I then went back to Angelo Oliveri to get the money heowed me and he told me that he could not get rid of the entire package. Oliveri then gave me about $300 more and the remainder of the package he had ($9700). Out the of $9700 that was given back to me by Oliveri, I gave $200 to Fred Gluck, and destroyed $7700.

The guy known to me as Jimmy has been identified in a photograph shown to me as James Heimerle.

GOVERNMENT'S EXHIBIT 12 FOR IDENTIFICATION

Warme's Confession (as partially redacted)

AFFIDAVIT

United States of America
District of

File No. J-NA-CO-5539-1
9211.

I Richard Warne stated that I have been advised by SA Vezeris, United States Secret Service, that under the provisions of the Constitution I have certain rights: The absolute right to remain silent, and that anything I say can be used against me in court of law or any other proceedings; that I have the right to consult with an attorney before answering any questions or making any statements, and that if I cannot afford an attorney and want one, that one can be appointed for me before I say anything; and if I decide to make any statements now, without an attorney present, I have the right to stop the questioning at any time.

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I have read the foregoing statement consisting of 2 pages. I fully understand this statement and it is true and correct to the best of my knowledge. I have made the corrections shown.

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Subscribed and sworn to before me this day May 1 19 70
at N.Y., N.Y.

Signature

Title

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The next day, I got a call from Bernie's friend Joe who told me that he had the package of $20 bills that I wanted and ~~who I and the other would come to my home in Irvington with $40,000 in $50 and $20 counterfeit bills.~~

Joe ~~and this other guy~~ were going to sell me this package for $140 in genuine money for each $1000 in counterfeit. ~~I then told them~~ I did not have the genuine money to pay for the package and ~~they told me to make my connection for the money and then~~ would return in about an hour. At that time, I called Angelo Oliveri at Palumbo Distributor

and he, Robert and Larry then came to my house in Irvington with about $3,000 in genuine money. I then gave the $40,000 in counterfeit to Angelo, Robert and Larry in two lunch boxes ~~[illegible] left my house~~. A short time later, Joe ~~and~~ returned and I gave ~~them~~ the $3,000 for a partial payment for the package. I told Joe ~~and that~~ I would pay ~~them~~ the remainder owed on the package in 3 or 4 days.

About 3 days later, I met Joe ~~and three others~~ at the Tiffany Diner on 4th Avenue in Brooklyn. During this meeting, ~~I met three others~~ I did not yet have the money to pay for the package ~~they~~ delivered earlier. ~~During the conversation [illegible] remarked to Joe that he was getting worried about why they were printing because they were printing late at night and he was afraid that the noise would bother some of the tenants who lived above them.~~

This meeting ended with my agreeing to pay ~~them~~ the difference on the package in a couple of weeks.

I then went back to Angelo Oliveri to get the money he owed me and he told me that he could not get rid of the entire package. Oliveri then gave me about $300 more and the remainder of the package he had ($9700). Out of the $9700 that was given back to me by Oliveri, I gave $200 to Fred Gluck, and destroyed $7700.

COURT'S EXHIBIT 3 FOR IDENTIFICATION

SEP 28 1976

Juror #8's father retired from the Police Dept. 7 years ago. — Juror has not discussed with his father for 10 years, nor has he ever seen him. — He stated that this would not affect his judgment.

COURT EXHIBIT
U. S. Dist. Court
S. D. of N. Y.
3
SEP 28 1976

COURT'S EXHIBIT 4 FOR IDENTIFICATION

EXHIBIT 4

SEP 28 1976

76 Cr. 442

Deft' Warne

Would the fact that your father was a member of the Police Dept. cause you to give greater credit to the testimony of a law enforcement officer, merely because of his position as such.

Jeff Wengard

COURT'S EXHIBIT 5 FOR IDENTIFICATION

COURT
EXHIBIT
U. S. Dist. Court
S. D. of N. Y.
5 Md
SEP 29 1976

SEP 29 1976

76 Cr. 442

May we have an
offer of proof
re Lt Neil's test.
Jeff Weingard

COURT'S EXHIBIT 10 FOR IDENTIFICATION

OCT 1- 1976 76 W. 442

Your Honor:

We are agreed on Count 1 for both defendants but seem to be hung on the rest of the indictment.

COURT
EXHIBIT
U. S. Dist. Court-
S. D. of N. Y.
10
OCT 1- 1976

Civil Docket

COURT'S EXHIBIT 11 FOR IDENTIFICATION

OCT 1 - 1976

Your Honor 76 Cr. 442

Do it proper for me

To advise you as to the basis

for our inability to reach agreement

Emil Toso

COURT
EXHIBIT
U. S. Dist. Court
S. D. of N. Y.
11
OCT 1 - 1976

COURT'S EXHIBIT 12 FOR IDENTIFICATION

OCT 1 - 1976 76 Cr. 442

Some jurors are not willing to accept any of the testimony from State witnesses who were co-conspirators whether named in the indictment or not.

COURT EXHIBIT
U. S. Dist. Court
S. D. of N. Y.
12
OCT 1 - 1976

E.J.L. 10/1/76

DEFENDANT WARME'S REQUESTS TO CHARGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- against -

Indictment No. 76 CR 442

RICHARD WARME

DEFENDANT'S REQUESTS TO CHARGE

DEFENDANT'S REQUEST NO. 1

DEFENDANT'S FAILURE TO TESTIFY

The defendant in this case has elected not to testify in (his) own behalf. There are many reasons why a defendant may decide not to testify. He may feel that because of the strain and tension he may not be a calm witness. He may be embarrassed by his lack of education or his inability to speak well in front of a group of people. You may not speculate as to why any of the defendants did not testify. You may not draw any inference whatsoever from the defendant's failure to take the stand. I remind you that any defendant may rely on the presumption of innocence and need do nothing more. The presumption of innocence is removed only if and when you are satisfied that the Government has sustained its burden of proof beyond a reasonable doubt. --United States v. Tramunti, No. 74-1550, Trial Transcript at 5169.

DEFENDANT'S REQUEST NO. 2

ACCOMPLICE TESTIMONY

An accomplice's testimony implicating a defendant as a perpetrator of a crime is inherently suspect for such a witness may well have an important personal stake in the outcome of the trial. An accomplice so testifying may believe that the defendant's acquittal will vitiate expected rewards that may have been either explicitly or implicitly promised him in return for his plea of guilty and his testimony.

United States v. Padgent, 432 F. 2d 701, 704 (2d Cir. 1970)

DEFENDANT'S REQUEST NO. 3

PROOF THAT DEFENDANT AFFIRMATIVELY PARTICIPATED IN CONSPIRACY

The fact that a defendant possesses knowledge that a crime is being committed even when that defendant also is present at the scene of the crime, without more, is insufficient to prove that the defendant was a co-conspirator. In order to find that the defendant was a co-conspirator mere presence and guilty knowledge are not enough unless you are convinced that the individual defendant was not a mere spectator, but a participant who affirmatively attempted to further the purposes of the conspiracy.

United States v. Terrell, 474 F.2d 872, 875-876 (2d Cir. 1973)

United States v. Cianchetti, 315 F.2d 584, 588 (2d Cir. 1963)

DEFENDANT'S REQUEST NO. 4

SINGLE CONSPIRACY REQUIREMENT (COUNT 1)

Should you find that the government has failed to prove, beyond a reasonable doubt, the existence of only one conspiracy as charged in Count 8 of the indictment, you must find the defendants not guilty. Proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment. If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, then you must acquit that defendant. In other words, to find a defendant guilty you must find that he was a member of the conspiracy charged in the indictment and not some other conspiracy.

U.S. v. Bynum, 485 F.2d 490, 495-497 (2d Cir. 1973)

U.S. v. Calabro, 449 F2d 885, 894 (2d Cir. 1971)

U.S. v. Sperling, 506 F. 2d 1323, 1341-1342 (2d Cir. 1974)

U.S. v. Tramunti, -- F.2d -- slip op. at 2138 - 2141 (2d Cir. dec. March 7, 1975)

U.S. v. Bertolotti, - F2d -, slip op. 6409 (2d Cir. dec. Nov.10, 1975).

DEFENDANT'S REQUEST NO. 5

SINGLE ACT DOCTRINE

For a single act to be sufficient to draw an actor within the ambit of a conspiracy to violate the federal counterfeiting laws, there must be independent evidence tending to prove that the defendant in question had some knowledge of the broader conspiracy, or the single act itself must be one from which such knowledge may be inferred.

U.S. v. Sperling, 506 F.2d 1323, 1343-1345 (2d Cir. 1974)

U.S. v. Denoia, 451 F.2d 979, 981 (2d Cir. 1971)

U.S. v. Agueci, 310 F.2d 817 (2d Cir. 1962)

U.S. v. Avilles, 274 F.2d 179, 189 (2d Cir.), cert. denied 362 U.S. 974 (1960)

DEFENDANT'S REQUEST NO. 6

DECLARATIONS OF CO-CONSPIRATORS

Before you consider any statements or declarations made by any co-conspirator you must first find, independent of these hearsay statements, declarations or utterances:

(1) that the declaration was in furtherance of the conspiracy;

(2) that there is sufficient other evidence to establish that the defendant against whom it is offered was a member of the conspiracy when the declaration was made;

(3) and that the statement bears sufficient indicia of reliability to assure the trier of fact an adequate basis for evaluating the truth of the declaration in the absence of any cross-examination.

See U.S. v. Puco 476 F.2d 1099 (2d Cir. 1973); rehearing denied May 4, 1973

Dutton v. Evans 400 U.S. 74 (1970)

DEFENDANT'S REQUEST NO. 7

VOLUNTARINESS OF THE CONFESSION AND THE WEIGHT TO BE ACCORDED SUCH A STATEMENT

Please charge the jury on the law of voluntariness of a confession and further instruct the jury that it may "give such weight to the confession as the jury feels it deserves under all the circumstances"

18 U.S.C.§3501 (a)

U.S. v. Barry, 518 F.2d 342 (2d Cir. 1975)

U.S. v. Lucchetti, - F2d - slip op. 2351 (2d Cir. dec. March 4, 1976).

DEFENDANT'S REQUEST NO. 8

INFORMERS ACTS AND DECLARATIONS NOT BINDING ON DEFENDANTS

If you find that any witness was a government informer prior to or during the period covered by the conspiracy charged in Count 8 and that he gave any information whatsoever to federal agents about any alleged member of the conspiracy at any time prior to or during that period, then his acts, statements and declarations are not binding upon the defendants and may not be considered by you against them.

OPINION OF JUDGE CARTER SETTING ASIDE PRIOR INDICTMENT OF HEIMERLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES HEIMERLE,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

76 Civ. 4277
76 Civ. 5669

#46051

APPEARANCES:

JAMES HEIMERLE, Pro se
150 Park Row
New York, New York

HON. ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007
by: BARBARA AMBLER
Special Attorney
Attorney for the United States
of America

MICROFILM
Jun 24 1977

CARTER, District Judge

OPINION

The petition to reconsider is granted. The defendant moved under 28 U.S.C. § 2255 to vacate his sentence and dismiss the indictment because of the government's lack of compliance with Article IV of the Interstate Agreement on Detainers Act (Pub. L. No. 91-538, §§ 1-8, 84 Stat. 1397 (1970) reprinted in 18 U.S.C. App. at 207 et seq.). On March 2, 1977, I denied the motion on the ground that the defendant had been brought to trial within 120 days after the federal government acquired custody of him from the state as required under Article IV(c) of the Detainers Act.

In his petition for rehearing, the defendant argues that the violation by the government which he claims entitled him to have the indictment dismissed is that he was returned to state custody without being tried on this indictment after detainers had been filed by the government and after he had been delivered into federal custody, not that the government failed to bring him to trial within the 120 days.

On reconsidering United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), particularly in the light of United States v. Cyphers, ___F.2d ___, Nos. 76-1131, 76-1160, Slip. Op. 1737-1752 (2d Cir. decided Feb. 8, 1977); and United States v. Ford, ___F.2d ___, No. 76-1319, Slip. Op. 1689-1703 (2d Cir., decided Feb. 3, 1977), it is clear that defendant is correct. As this circuit has interpreted Article IV(e) of the Detainers Act, a defendant once turned over to federal authorities pursuant to a writ of habeas corpus ad prosequendum to answer federal charges must be tried on the pending federal charges before being returned to state custody. Although the provisions of the Act may be waived, see United States v. Ford,

at 1698, in the absence of waiver, the return of a defendant to state custody without trial after a detainer has been lodged against him necessitates dismissal of the federal indictment.

No waiver occurred here. It is true that Heimerle did not protest the government's use of a series of successive writs of habeas corpus ad prosequendum pursuant to which he was brought in federal custody to answer various charges and returned to state custody without a trial in the federal matters. As Judge Brieant stated in a companion case:

> "Waiver is the intentional relenquishment of a known right. Prior to the decision of Judge Bartels [in Mauro] on May 17, 1976, who could have known?"

Heimerle v. United States, 76 Civ. 5563 (S.D.N.Y., Dec. 15, 1976). Defendant was delivered into federal custody on January 18, 1973, pursuant to a writ of habeas corpus ad prosequendum at which time he entered a plea of not guilty and was returned to state custody without first being tried on the federal indictment. He was again delivered into federal custody on May 2, 1976 pursuant to a second writ of habeas corpus ad prosequendum for pre-trial hearings and trial May 2-May 11. Since he was returned to state custody in January, 1973 without being tried on this indictment, he is entitled to dismissal of the indictment with prejudice.

SO ORDERED.

DATED: New York, New York
June 22, 1977

Robert L. Carter

ROBERT L. CARTER
U. S. D. J.

2 Copies Received

Date August 15 1977

Firm Hon. Robert B. Fiske, Jr.

By _____